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OCTOBER TERM, ~~1946~~.

No. ~~12~~, Original.

59

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF CALIFORNIA,

Defendant.

Brief for the State of California in Opposition to Motion for Judgment.

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FOREWORD.

In order to enable the Court to obtain an over-all view of California's case and the basic grounds in support thereof without breaking the main thread of the argument, we have submitted the brief in two parts. The first part contains the basic argument on all points. The second part contains a series of appendices setting forth the supporting authorities and data as to those points which require more detailed treatment.

The brief filed by plaintiff herein contains not only arguments upon the pleadings but is a presentation of its entire case, both upon the law and the facts. The State of Cali-

fornia in its brief has met all the legal and factual issues presented by plaintiff and has also set forth the affirmative basis of California's title. The briefs and the oral argument, therefore, constitute the subject matter of an original trial of the cause on all issues, both of fact and law. The material contained in the appendix constitutes, in the main, the factual data which, in a case on appeal, would be contained in a transcript of the evidence.

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American State Papers, Class I, Foreign Relations, Vol. 1, p. 183 (Letter to French Minister) 190

Appendix to Congressional Globe, 31st Congress, 1st Sess., pp. 960, 1001, June 24, 1850 95

Bacon's Abridgment Edition by Bouvier (Philadelphia, 1869), Vol. 8, p. 13 47

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40 American Journal of International Law, pp. 53, 56, Borchard, Resources of Continental Shelf (Jan. 1946) 177

4 American Journal of International Law, pp. 133, 141, Ralston, "Prescription" (1910) 139

Angell, Tide Waters (2d Ed., 1847), pp. 53, 55, 57 116

Azuni, Sistema Universoli dei Principii del Diritto Marittimo (1795), English translation (New York 1806), I, p. 205. Joseph Story's copy of the latter is now in the Harvard Law Library 189

2 Batchellor, Laws of New Hampshire, Province Period, 1702-1745, pp. 493-7 179

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Essay on the rights of the Crown in the Sea-Shores of the Realm (first published in 1830), 3d Ed., reprinted in Moore, Stuart A.; History and Law of the Foreshore and Sea Shore (London, 1888), p. 667 ..... 20, 47

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Fulton, Sovereignty of the Sea (1911), p. 566 179

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1 Hackworth, "Digest of International Law," p. 441 (Chamizal Arbitration Award Between the United States of America and Mexico, June 15, 1911) 139

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4 Kent's Commentaries, p. 470 (11th Ed. edited by Oliver Wendell Holmes) 48

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3 Tiffany, Real Property (3rd Ed., 1939), p. 638 115

2 Valin, Nouveau Commentarie sur l'Ordonnance de la Marine (1760), p. 638 178

van Bynkershoek, Cornelius, De Dominio Maris Dissertatio, Chap. 2, as translated by Magoffin in Classics of International Law, p. 44 178

Vattel, "Law of Nations," Book II, Chap. XI, Sec. 149 139

Vattel, Le Droit des Gens (1758), pp. 250-251, as translated by Fenwick in Classics of International Law, p. 169 178

1 Westlake, "International Law" (1904), pp. 92-94 139

Wheaton, "Elements of International Law" (1836 Ed.), Part II, Chap. IV, Sec. 4 139

Wilson, G. G., "International Law" (1910), pp. 79-85 139

Wilson, G. G., "International Law" (1939 3rd Ed.), pp. 79-80 139

Ziegler, "The International Law of John Marshall" (1939), p. 58 139

TREATIES

American-Morocco Treaty of 1786 190

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Outline of Argument.

Point I contains a general statement of the nature and scope of plaintiff's claims.

Point II deals with the jurisdiction of the Court and with the question whether there is a case or controversy under Article III, Section 2, of the Constitution. The brief contains only a summary of these points. The supporting authorities and a more complete statement of the points are contained in Appendix A.

Point III presents the question whether the Attorney General is authorized to bring or maintain this proceeding. Supporting data on this point are in Appendix B.

Point IV sets forth the alleged source of plaintiff's title and states very briefly plaintiff's chief arguments in support thereof. This is done to bring into clear focus the issues which we are called upon to meet in the argument that follows.

Point V sets forth the historical and legal basis of California's title (not including special affirmative defenses). The subject is developed under the following subheads:

A. The rights of the Crown of England with respect to the marginal sea, as determined by both English and American courts and authorities. A complete summary of the English authorities is contained in Appendix C.

B. The rights of the original States as successors of the Crown.

C. The affirmative acts and claims of the Colonies and of the original States with reference to the marginal sea. The details of the Colonial Charters and legislative acts are contained in Appendix E.

D. Under this head we have shown that the original States never ceded to the Federal Government lands beneath navigable waters within their respective jurisdictions.

E. Under this head we have set forth the basic legal principles under which the original States were and are the owners of all lands beneath navigable waters within their respective jurisdictions (except lands previously granted).

F. Under this head we have shown the historical and factual basis and the legal authorities for the principle that lands beneath navigable waters were held by the original States by virtue of and as an incident to State sovereignty.

G. Under this head we have shown that:

(1) In territory acquired by the Federal Government, both from the original States and by conquest and purchase from other nations, all lands beneath navigable waters were held only in trust for the future States which were to be created out of such territory;

(2) There is a constitutional principle which requires that new States must be admitted to the Union on an equal footing with the original States as to all matters incident to State sovereignty;

(3) Hence, new States upon their admission to the Union are vested with the same rights of ownership of lands beneath their navigable waters as the original States; and

(4.) The reservation of the primary disposal of the public lands in the various Acts admitting new States was not and could not have been a reservation of lands beneath navigable waters, for the reason that such a reservation would have violated the constitutional rule of the equality of States.

H. Under this head we have set forth a series of decisions of this and other Courts which uphold State ownership of the bed of the sea within the State's jurisdiction. These cases are an answer to the argument advanced by plaintiff that this Court has never dealt with this question.

I. Under this head we have shown that the long line of decisions of this and other Courts, holding that the States are the owners of all lands beneath the navigable waters within their boundaries, have established a fundamental principle of public law; that this principle of law so often repeated in the Courts' decisions is not *dictum* but is a basic principle which has established a rule of property. We have shown, also, that this Court has never in its history overruled a rule of property upon which titles to real estate have generally been predicated.

Point VI presents the argument that California has good title by prescription. The authorities are set forth showing that this Court has uniformly held that as between States, or as between a State and the Federal Government, the doctrine of prescription is in full force. We have shown that the acts of the State of California, from the time of its admission, have been far more than suffi-

cient to comply with every requirement of the rule of prescription.

Point VII deals with the law and facts relating to the long acquiescence by the Federal Government in the exercise of ownership and jurisdiction over all lands beneath navigable waters within the State of California. It has been necessary to place a large part of the factual data of acquiescence and also the detailed answers to plaintiff's arguments with respect to specific instances of acquiescence in Appendix G.

Point VIII deals briefly with estoppel, laches and *res judicata*. The supporting material on these subjects is in Appendix H.

Under Point IX we have discussed the questions raised in plaintiff's brief as to the development in international law of the marginal sea doctrine and have shown that the Federal Government, as against the States, could not have acquired any property rights in the marginal sea by reason of its course of action in international affairs.

A number of other incidental matters are included in the appendix.

NOTE AS TO ITALICS:

Italics used in this brief and in the appendices thereto have been supplied by counsel for defendant except where otherwise specified.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 12, Original.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF CALIFORNIA,

Defendant.

Brief for the State of California in Opposition to Motion for Judgment.

I.

NATURE AND SCOPE OF PLAINTIFF'S CLAIMS.

The claims of plaintiff against the State of California are set forth in Paragraph II of the complaint as follows:

> "At all times herein mentioned, plaintiff was and now is the owner in fee simple of, or possessed of paramount rights in and powers over, the lands, minerals and other things of value underlying the Pacific Ocean, lying seaward of the ordinary low water mark on the coast of California *and outside of the inland waters of the State,* extending seaward three nautical miles and bounded on the north and south, respectively, by the northern and southern boundaries of the State of California."

The prayer is for a decree

> ". . . declaring the rights of the United States as against the State of California in the area claimed by California and enjoining the State of California and all persons claiming under it from continuing to trespass upon the area in violation of the rights of the United States."

It is clear from Paragraph II and is admitted in plaintiff's brief (pp. 4, 5 and 217) that the lands attempted to be described are wholly within the constitutionally established boundaries of the State of California. Plaintiff also admits that these boundaries were approved by the Congress of the United States (p. 61).

The California coast line extends from Mexico to Oregon, a distance of approximately 1,000 miles, not allowing for the smaller curves and sinuosities of the shore. Plaintiff is claiming title to, or paramount rights in, about 3,000 square miles of territory wholly within the boundaries of California.

It is important to note that, although California has been selected as the only defendant in this case, plaintiff's claim, in reality, extends to the marginal sea[1] adjacent to all the twenty-one coastal States in the Union. Plaintiff has not claimed that California is under any special disabilities or is in any less favorable position than other

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[1]The term "marginal sea," as we shall show later (App. A, pp. 14 *et seq.*) does not describe any specific area of water, and is not susceptible of use in a court decree to identify any particular tract or area of submerged land. The plaintiff has used this loosely descriptive term to characterize the indefinite area of submerged land which is the subject of its claim. We shall continue the use of the term in that sense, merely for the purpose of reference to the plaintiff's claim.

coastal States. The rights of every coastal State to its submerged lands are under attack in this proceeding. Even though in a technical sense a judgment herein would not be *res judicata* against other States, it is obvious that if the Court holds in this case that California has no property rights in the marginal sea, it will, in reality, decide the question for all coastal states. Such a ruling would create a legal duty on the Attorney General of the United States to institute similar original proceedings against the other States, which proceedings would be predicated on the judgment in this case. It has, in fact, been publicly stated by the Attorney General that in the filing of this action there was no intention to discriminate against California but that the object of the case was to "settle" the question for all coastal States.[2]

The arguments in the opening brief make it clear that as a result of this case plaintiff hopes to acquire title or paramount rights in a 3 mile belt of submerged land around the entire coast line of the United States from Maine to Washington. This fact is important as a background to the consideration of the basic constitutional problems presented in plaintiff's brief, for these problems, as we have said, do not involve merely California's relation to the Federal Government; they also

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[2]Speech of Honorable Tom C. Clark before National Association of Attorneys General, Jacksonville, Florida, November 27, 1945. Mr. Clark's statement was as follows: "In filing the action in the Supreme Court against the State of California alone, there was, of course, no intention to discriminate against that State. There are many other coastal states of the Union as well as thousands of individuals and corporations who assert claims in the marginal sea area under authority of the states. The decision of the Supreme Court, we hope, will settle the question as to all the coastal states of the Union."

involve the relation of all States to the Federal Government.

Plaintiff claims "lands, minerals and *other things of value* underlying the Pacific Ocean below low water mark and outside inland waters."[3] Viewed in terms of the entire coast line of the United States, this is an extremely revolutionary and far-reaching claim.

"Things of value" seaward of low-water mark fall generally into two classes: (1) physical improvements and (2) natural products.

Physical Improvements.

It is implied throughout plaintiff's brief that plaintiff is claiming only vacant and unoccupied land along an open and barren coast line. Such, of course, is not the case. Large sections of the open coast both in California and elsewhere, are built up with expensive improvements which exist either wholly or partially below low-water mark. In many instances the open coast line has been extended seaward below low-water mark by filling, and on such filled lands highways, railroads, commercial structures and innumerable other improvements have been made—not to mention recreation beaches and public parks. Likewise, there are hundreds of piers, wharves, docks, breakwaters and other structures which actually extend out into the ocean below low-water mark on the open coast.

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[3]The term "inland waters" is subject to the comment made as to "marginal sea" (Footnote 1). It describes no specific area of water but, in connection with the terms "ports, bays and harbors," is loosely descriptive of the undefined portions of the submerged lands within the State which plaintiff asserts are not claimed in this action. We use these terms in the same sense. (See discussion of these terms, Appendix A, pp. 14 *et seq.*)

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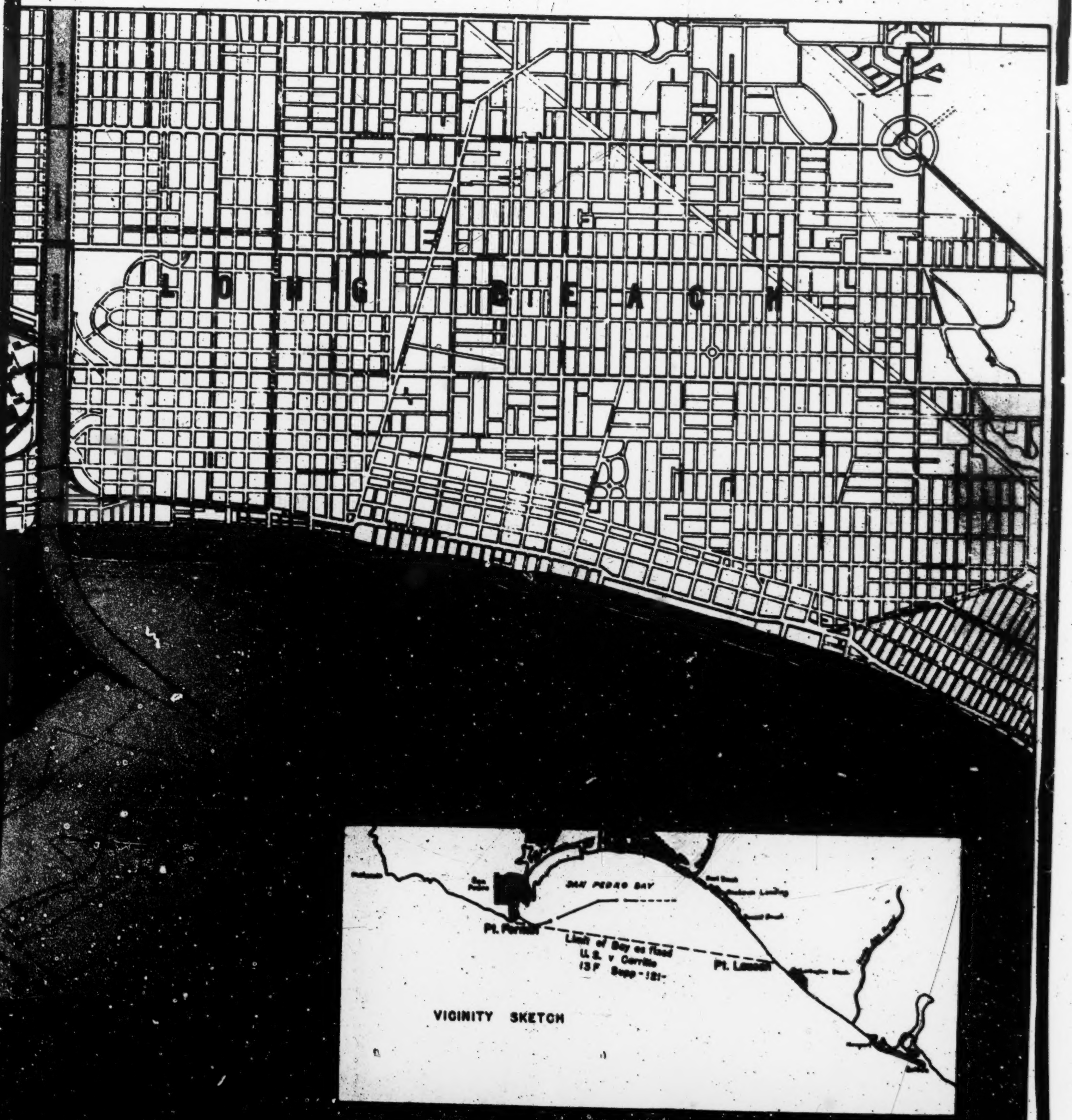
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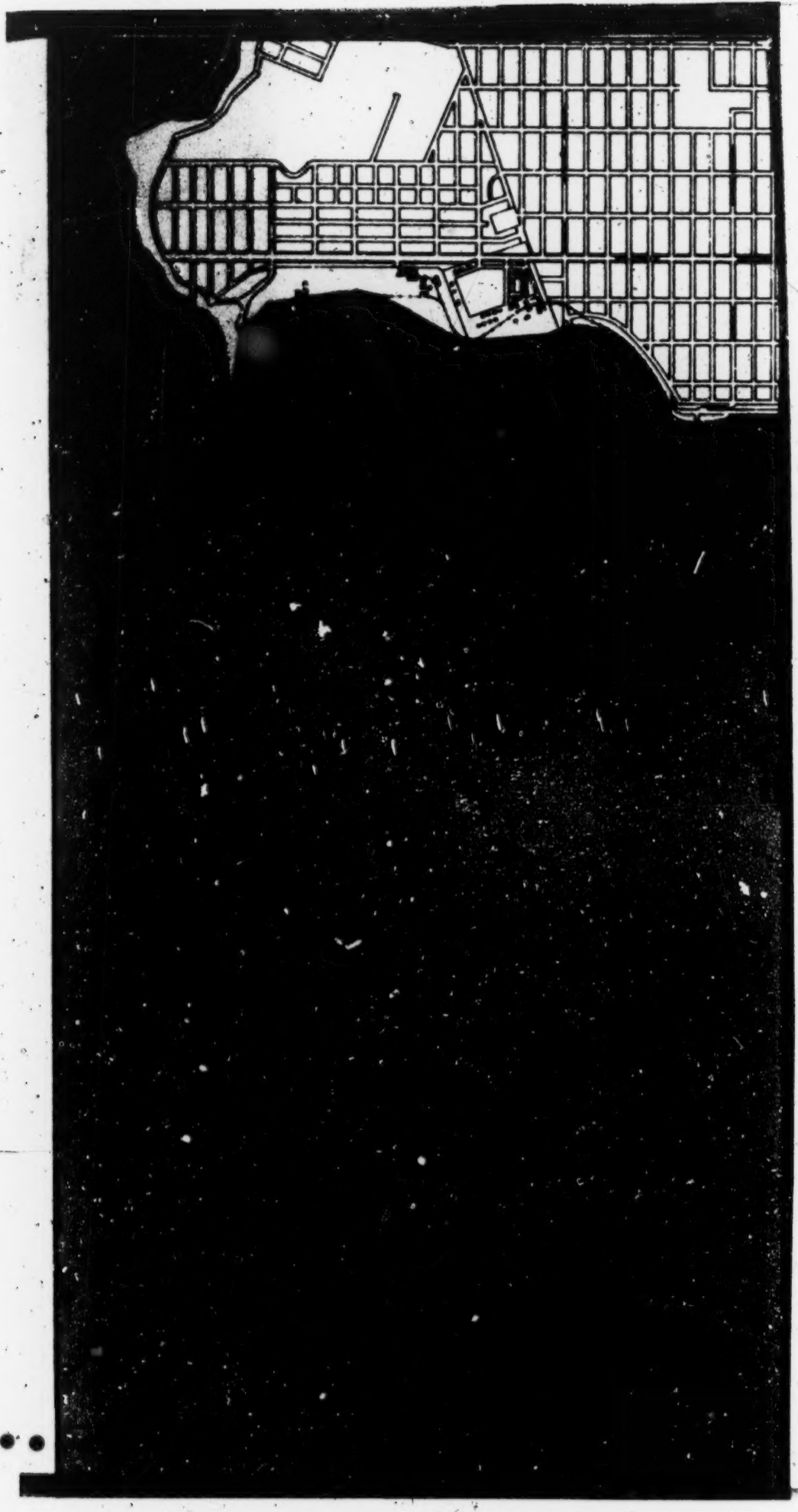

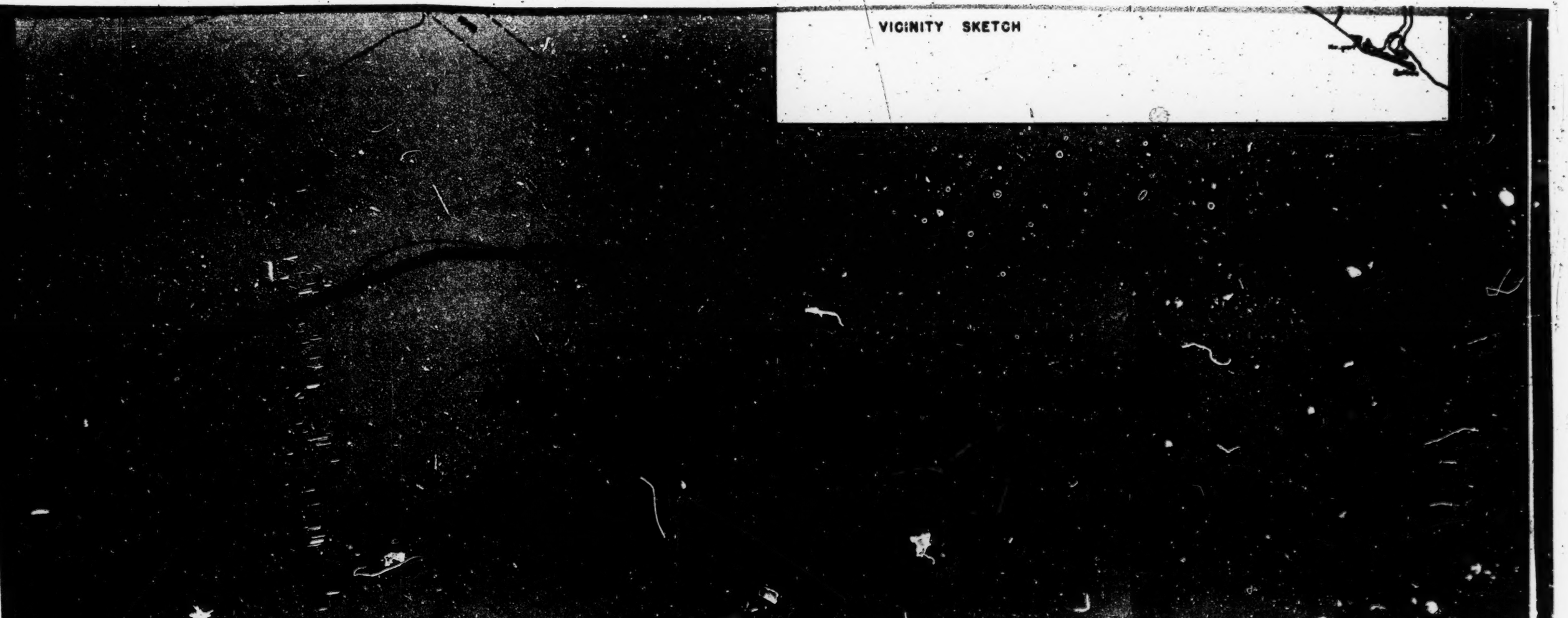
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Furthermore, it is impossible to know what is meant by the "open coast." All commercial harbors necessarily have improvements extending below low-water mark. Many such improvements may extend into the "open sea." Likewise many harbors are artificially constructed by breakwaters extending into the open sea. Within such harbors enormously valuable improvements such as shipyards, warehouses, factories, fish canneries and terminals frequently exist.[4] Plaintiff says (Br. p. 143) that there is "a strong public policy in favor of safeguarding property rights which have long been established by judicial decision . . ." But plaintiff would have the Court believe that if there are any property rights at all involved in the marginal sea, they are merely nominal. Plaintiff says these "possible equities" are so relatively "insignificant" (Br. p. 165) that the Court need feel no compunction in declining to apply its past decisions to this area. Yet plaintiff asserts (Br. pp. 228, 231) that it is doubtful whether San Pedro Bay and Santa Monica Bay come within the category of "inland waters" or "open sea," thus reserving its claim to everything of value below low-water mark in these bays and harbors. The value of the improvements below the original low water mark in San Pedro Bay alone which would be lost to the owners if the Court resolved this doubt in plaintiff's favor, would be in excess of $100,000,000.00. What this value would amount to in all the "ports, bays, harbors and inland waters" as to the status of which plaintiff is in doubt is impossible to estimate, but it would run into many hundreds

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[4]See Map of Los Angeles and Long Beach Harbors opposite this page. The area colored red represents filled land and improvements below the original mean high tide line. Most of it is below the original low water line.

of millions of dollars. So long as plaintiff reserves the right to claim these enormously valuable properties it cannot be said that they are *not* claimed in this action and it cannot, therefore, be said that the equities involved are so insignificant as not to merit the application of settled rules of property law. Even below low water mark in the open sea "the equities" are not insignificant, but if they could all be computed would reach enormous figures.

Plaintiff has repeatedly asserted, in its brief (pp. 1 and 2) and elsewhere, that the Federal Government is not claiming title to lands beneath ports, bays and harbors in this case. Indeed, the President of the United States positively so stated to the people of California and the United States in his official message (dated August 1, 1946) vetoing an Act of Congress which would have quieted the title of all the States to all lands beneath their navigable waters. In this message he said:

> " . . . Contrary to widespread misunderstanding, the case does not involve any tidelands, which are lands covered and uncovered by the daily ebb and flow of the tides; nor does it involve any lands under bays, harbors, ports, lakes, rivers or other inland waters. Consequently the case does not constitute any threat to or cloud upon the titles of the several States to such lands, or the improvements thereon. . . . "

Notwithstanding the public statement of the President, plaintiff *in this case* reserves its claim to two of the most important bays in California, namely, San Pedro and Santa Monica Bays,[5] including some hundreds of millions of dollars of improvements within those bays. Plaintiff

[5]Plaintiff's Brief, pp. 228 and 231.

is apparently not willing to accept the decision of the highest court of California,[6] which holds that Santa Monica Bay is a bay, and the decision of the Federal District Court,[7] which holds that San Pedro Bay is a bay. Incidentally, plaintiff likewise reserves its claim to Massachusetts Bay.[8] In view of these reservations, the statement on page 2 of plaintiff's brief that "This case is *limited strictly* to lands within the three-mile belt on the open sea," seems hardly in accordance with the facts. The case is not *"limited"* at all, but left wide open for the plaintiff to claim that any important bay is not what plaintiff calls (Br. pp. 228, 231) a "true bay."

Natural Products.

The natural products underlying the ocean below low-water mark include fish, both "free swimming" and those found upon or attached to the soil, such as oysters, clams, lobsters, abalone and similar sea life sometimes called "sedentary fish". Also of great value below low-water mark are sponges and kelp, the latter used extensively in the manufacture of potash and iodine. In three States, California, Texas and Louisiana, oil is produced from below low-water mark. Numerous other minerals are found in and under the sea along the coasts of the various states.

The Federal Government now claims "everything of value" below low-water mark. It makes this claim on the theory that it owns, or has paramount rights over, the marginal sea in the same sense that it owns the uplands known as "public lands." It is obvious that if this claim

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[6]*People v. Stralla*, 14 Cal. (2d) 617 (1939).
[7]*United States v. Carrillo*, 13 F. Supp. 121 (S. D. Cal. 1935).
[8]Plaintiff's Brief, p. 254.

were upheld plaintiff would control the taking of fish and all other products of the sea just as it controls the taking of game, minerals or timber in the national forests, notwithstanding that the states have from time immemorial been held to have not only full control but *exclusive ownership* of all fish and other products of the sea within their respective boundaries. (*Infra*, pp. 58-65.)

The fishing industry is one of the largest in California. The value of all types of fish taken from the marginal sea within the State's boundary and under State control greatly exceeds the value of all petroleum and other minerals taken from the sea.[9] If the Federal Government

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[9]The value of the fish (exclusive of crabs, abalone, clams and lobsters) caught in California waters, in terms of money paid to fishermen, for the years 1942 to 1945, inclusive, is as follows:

Year	*Value to Fishermen*
1942	$26,100,000.00
1943	31,900,000.00
1944	36,100,000.00
1945	38,830,400.00

The value of canned fish produced in California for the same years is:

Year	*Value*
1942	$67,432,689.00
1943	70,496,100.00
1944	79,074,776.00
1945	79,755,151.00

(Footnote continued on next page)

should assume control, regulation and ownership of the fish within the boundaries of the several coastal States, the resulting dislocation in the economic and political life of the States would be far-reaching in the extreme and would constitute the greatest shift of political and economic power from States to Federal Government at any one time since the adoption of the Federal Constitution.

The value of fish meal and fish oil produced in California for the same years is:

Year	*Value*
1942	$13,998,542.00
1943	15,386,369.00
1944	19,694,321.00
1945	13,557,169.00

Of the total production of fish from California during the war years, from 40% to 75% was delivered to the United States for the Armed Services and other government uses. In the years 1942 to 1945, inclusive, 310,311 *tons* of fish taken from California waters were delivered to the United States Government.

The value of California's canned fish, meal and oil is over 40% of the total value of all canned fish, meal and oil produced in the entire United States and Alaska.

Fish Harbor at Los Angeles (see map, p. 5) is constructed on filled land, wholly below the original low-water mark. In 1945 more fish were landed at Los Angeles than in any other port in the United States,—Monterey, California ranking second, Gloucester, Massachusetts third, San Francisco fourth, and Boston, Massachusetts fifth. There are 19 modern fish canneries in Los Angeles Harbor, most of which are built on filled land below the original low-water mark and subject to plaintiff's claims if it should resolve its present "doubts" in favor of Federal ownership.

(The above figures and data taken from *Fish Bulletins* Nos. 59 and 63 and Statistical Reports of California Division of Fish and Game.)

The total income from California's fisheries to fishermen, manufacturers, wholesalers and retailers for the year 1945 is

The institution of this suit represents an effort by the Federal Government, now being made for the first time in our national history, to invade and to usurp the long-established territorial rights, not of California alone, but of all our coastal States. It is an attack on a policy and practice followed consistently by every coastal State of the United States from the beginning of its history as a State—by some of our coastal States since colonial times—in which the Federal Government has always heretofore acquiesced. It is an attempt to overthrow and reverse a rule of property which has been applied and followed by this Court throughout a hundred years.

$147,000,554.00 calculated on basis used in *Fisheries Resources of the United States*, 79th Congress, Senate Document 51.

The total value of all petroleum produced from below the line of mean high tide on the California coast for the years 1942 to 1945, inclusive, is as follows:

Year	*Value*
1942	$11,234,180.00
1943	15,381,220.00
1944	23,511,138.75
1945	25,308,163.75

These figures are supplied by the California State Lands Division and Long Beach Harbor Department. In California about 15 miles of its 1000 miles of coast line contain oil wells which extend below low-water mark. (*Joint Hearings House Judiciary Committee*, June 18-20, 1945.) See Map, *infra*, p. 146.)

II.
JURISDICTION.

We believe there is grave doubt as to whether the Court has jurisdiction of the case as presented in plaintiff's complaint and opening brief. And since the jurisdiction of the Court must of necessity be the initial inquiry in every original proceeding, we shall deal with that subject before presenting our affirmative arguments as to California's title.

There Is No Case or Controversy Under Article III, Section 2 of the Constitution.

The following is merely a summary of the points on which we base the assertion that plaintiff has presented no case or controversy within the constitutional power of the Court to adjudicate. The factual data and legal authorities which fully support these points are set forth in detail in Appendix A, pp. 1-31.

A. There Is No Controversy in a Legal Sense, But Only a Difference of Opinion Between Federal and State Officials.

This action is the result of doubts which arose in the mind of the former Secretary of the Interior with regard to his power to issue federal oil leases of submerged coastal lands in California. By reason of his doubts on this question he

> "stopped all action in the Department which was based on the assumption that the States owned these submerged lands, and began to press for *a judicial solution of the debated issue of law.*"[10]

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[10]Testimony of the Secretary before the Senate Judiciary Committee, set forth more fully in Appendix A, pp. 4-5.

No federal official has ever attempted to take any action to enforce the alleged rights or powers of the Federal Government and Congress has passed no statute authorizing Federal officials to take any action with respect to submerged lands.

Neither the Secretary nor any other Federal official has ever been frustrated or interfered with in the attempt to exercise any alleged Federal powers. The only thing that prevented the Secretary from acting was his own doubts. This Court said in *Willing v. Chicago Auditorium*, 277 U. S. 274, 289 (1927):

> "The fact that plaintiff's desires are thwarted by its own doubts, or by the fears of others, does not confer a cause of action."

No issue exists as to the exercise of any specific governmental power. The Court is simply asked for an abstract opinion on "the debated issue of law."

The prayer of the complaint, which asks the Court to declare "the rights of the United States as against the State of California in the area claimed," would require an adjudication in the abstract of innumerable questions which would deal with hypothetical situations only. It is not within the constitutional power of the Court to render such a decree.

In *United States v. West Virginia*, 295 U. S. 463 (1935), this Court said (p. 474):

> "General allegations that the State challenges the claim of the United States . . . and *asserts a right superior* to that of the United States . . . raise an issue too *vague and ill-defined* to admit of judicial determination."

B. It Is Impossible to Identify the Subject Matter of the Action.

The basic requirement of a judicial controversy is that it "must be definite and concrete," it cannot be predicated upon a "hypothetical state of facts."[11]

It is impossible to ascertain from the complaint or brief what lands are the subject of plaintiff's claim. The complaint describes no lands which can be identified. A decree purporting to adjudicate ownership of the area referred to in the complaint and to enjoin the State and those claiming under it from trespassing thereon would be purely hypothetical. Such a decree would quiet title to no particular land and would enjoin no trespassers. No alleged trespasser would know upon what land he was forbidden to trespass. The decree would serve no purpose except for the guidance of plaintiff in bringing subsequent actions in which specific relief could be granted.

The question of title or ownership of land cannot be determined in the abstract before it is determined what land is to be the subject of the decree.

There are hundreds of curves and indentations in the California coast which may or may not constitute bays and harbors or "inland waters." Plaintiff itself cannot specify what constitutes a bay or harbor or "inland waters" and reserves its claims to such bays as San Pedro Bay and Santa Monica Bay, on the ground that it is in doubt whether they are "true bays."[12] No legal or factual definition of a "true bay" exists and the question what con-

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[11] *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 240 (1937).

[12] Br. pp. 228, 231.

stitutes a "true bay" is not susceptible of adjudication under any statute or rule of decision but can only be arbitrarily defined by legislative action or by a decree in a particular case when all the facts are before the Court.

No criterion exists by which the Court can define a property line between "inland waters," ports, bays and harbors on the one hand and the marginal sea on the other.

Plaintiff admits that certain bays are "historic bays" and thus come within the category of "true bays." It is impossible to predicate land titles on this basis because to do so would mean that title to real property would pass from one sovereign to the other whenever a bay becomes established as an "historic bay."

It is likewise impossible to predicate land titles on the assumption that lands are within or beneath ports or harbors because ports or harbors have no fixed legal meaning, may be artificially created and changed from time to time as a result of artificial factors or legislative action, and may exist in the open sea, as well as in a natural bay.

For these (and other reasons stated in Appendix A) it would be impossible in this case to render a decree which could be made to apply to any particular land. Plaintiff does not ask the Court to adjudicate title to any particular land. It merely asks the Court to advise it as to whether there are any principles of law under which it could be the owner of submerged lands and, if so, what those principles are. Such an opinion is not within the constitutional power of the Court to render.

III.

THE ATTORNEY GENERAL IS NOT AUTHORIZED TO BRING OR MAINTAIN THIS PROCEEDING.

There is a serious question as to whether or not the Attorney General is authorized to commence or maintain this proceeding.

This question arises by reason of the policy of Congress, followed by it for over 100 years, of affirmatively recognizing and declaring the ownership of the States in the submerged lands underlying the marginal seas as well as under their "inland waters." .This *policy* of Congress has been recognized by this Court and other courts in many decisions.

The supporting data establishing this policy of Congress is set forth in the chapter on "Acquiescence" (*infra*, pp. 154-157).

The office of Attorney General was created by Act of Congress and his authority emanates from Congress. Twice in the last eight years specific authorization has been requested of Congress for the Attorney General to file a proceeding such as the instant one. On each occasion Congress has refused to grant the requested authorization or to change or alter its policy with respect to State ownership of submerged lands.

The present suit was, therefore, brought by the Attorney General not only without any specific authorization from Congress but in direct conflict with the established policy of Congress on the subject and in disregard of Congress' refusal to authorize such action.

A proceeding filed without authority should be dismissed. The decisions and the factual circumstances on this subject are set forth in Appendix B to this Brief.

IV.

ALLEGED SOURCE OF PLAINTIFF'S TITLE.

Plaintiff claims that it acquired title or rights to lands beneath the marginal sea of California from Mexico under the Treaty of Guadalupe Hidalgo in 1848. (Br. p. 7.) . Plaintiff's assumption apparently is that Mexico had proprietary title to the lands within the three-mile belt which passed to the United States by that treaty. Nothing is said as to how Mexico acquired this title but the assumption appears to be that Mexico's title "emerged" under international law at some unspecified date prior to February 2, 1848. Since plaintiff's position is that property rights in the three-mile belt did not become recognized in international law until after 1789, it must follow under plaintiff's theory that Mexico acquired title under international law between 1789 and 1848.

The lands thus acquired from Mexico are (according to plaintiff's theory), still the property of the United States for the sole reason that neither the Act of Admission nor any other statute expressly granted these lands to California. This is the affirmative basis of plaintiff's case.

In claiming that lands beneath the marginal sea did not pass to California, plaintiff relies on the general rule that "grants of public property. . . . must be expressed in clear and explicit language" and are not to be implied. (Br. p. 63.) Yet plaintiff is forced to concede that the lands beneath "inland waters," ports, bays and harbors and between high and low water have been held by this Court to be so closely identified with State sovereignty that they did vest in California *without any grant at all*

except as the Act of Admission might be considered as having the effect of a grant. Plaintiff's entire brief is taken up with the attempt to explain why lands within the State's boundaries lying seaward of low water mark and outside of "inland waters," ports, bays and harbors did not likewise vest in California on the same grounds.

In order to explain this inconsistency plaintiff advances two main theories:

> (1) That the original States never owned any lands below low-water mark and outside bays and harbors, and, hence, the equality rule did not require that such lands vest in California.
>
> (2) That in any event ownership of lands beneath navigable waters, whether "inland waters" or marginal sea, is not an attribute of sovereignty at all, and hence did not vest in California by virtue of its sovereignty under the equality rule.

In order to maintain the proposition that the original States did not own any lands below low-water mark and outside bays and harbors, plaintiff adopts the following line of argument:

> (1) That the rights of the English Crown in the bed of the sea, which were admittedly asserted in the 16th and 17th centuries,[13] were abandoned in the 18th century. From some undesignated date prior to 1776 until some undesignated date after 1789 (but before 1848) there was a hiatus in ownership of the marginal sea, during which time there was no owner at all.

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[13]Br. p. 24, *et seq.*

(2) That during this hiatus in ownership the Federal Government was established as the National sovereign.

(3) That the three-mile belt of marginal sea is a creature of international law sponsored by the Federal Government and hence, when rights of ownership did become recognized under international law, such rights, *so far as the original States were concerned,* "emerged" in the National sovereign. Under plaintiff's theory this must have occurred between 1789 and 1848.[14]

In order to maintain the alternative proposition that ownership of lands beneath navigable waters was not an attribute of sovereignty at all, plaintiff is forced to repudiate as "patently unsound" the whole body of jurisprudence which has grown up in England and America for hundreds of years and which is predicated upon the doctrine that title to lands under navigable waters is governmental in its nature and is "so identified with the sovereign powers of government"[15] as to be considered necessarily incidental thereto.

In the endeavor to support the theory that neither the Crown nor the original States had any property rights in the three-mile belt during the interim from 1776 to 1789, but that such rights "emerged" subsequently in the

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[14]Since the marginal sea of California is claimed by plaintiff as successor to the Republic of Mexico, plaintiff must assume that proprietary rights in California's marginal sea "emerged" in the Republic of Mexico by virtue of international law at some date between 1789 and 1848. If such rights had emerged before 1789, presumably they would have likewise emerged on the Atlantic coast and in such case would have vested in the original States or in the Crown.

[15]*Massachusetts v. New York,* 271 U. S. 65, 89 (1926).

National Government, plaintiff devotes more than one-third of its brief to a review of the development of the marginal sea idea in international law. It is our view that this entire subject is wholly irrelevant to the issues in this case. This is not an international law case and the issues cannot be decided by the application of any principles of international law.

International law does no more than create the conditions under which a littoral state may be free from foreign interference in the exercise of the powers of ownership in the marginal sea which are conferred upon it by its own law. International law does not create any proprietary interest in the marginal sea and is not a source of land titles. Proprietary ownership of land never did "emerge" and never could have "emerged" and become vested in any state or country under international law. International law could not affect the "distribution of rights and powers" as between States and Federal Government. That is determined only by the Constitution.

The United States cannot acquire proprietary rights in land for itself as against the States through the performance of its constitutional duties in the conduct of foreign affairs.

The true rule as to what law governs this case was stated by Chief Justice Marshall in *Johnson v. McIntosh*, 8 Wheat. 543, 572 (1823), as follows:

> ". . . title to lands, especially, is, and must be, admitted, to depend entirely *on the law of the nation in which they lie.*"

However, since plaintiff's case is based on the theory that Federal ownership of the three-mile belt is "derived exclusively from the position of the national sovereign in international affairs" (Br. p. 89), we intend, at the close of this brief, to set forth in more detail the authorities which will show that this theory is wholly fallacious. (*Infra*, p. 174 *et seq.*) We desire, first, however, to proceed with an affirmative showing of the historical and legal basis of California's title.

V.

THE BASIS OF CALIFORNIA'S TITLE.

California's title to all lands beneath navigable waters within its boundaries is predicated upon the rule that the original thirteen States acquired all lands of this character from the Crown of England, that such lands were held by the original States in trust for the public as an incident to their sovereignty and that upon the admission of California to the Union on an equal footing with the original States, not only the lands beneath bays and harbors and between high and low tide, but all lands beneath navigable waters vested in California as a sovereign State.

As above stated, plaintiff, in order to support its theory that the original States had no title, has been forced to attack the common law principle that lands beneath the marginal sea were the property of the English Crown prior to 1776. We, therefore, take up the authorities on the common law of England.

A. The Rights of the English Crown Under the Common Law.

1. The Common Law as It Existed in England in and Prior to 1776 Governs in This Country Regardless of Variations in England Subsequent to That Date.

The rights of the Crown of England *as against its subjects in the new world* cannot be determined by international law. That question can be determined only by the law of England as it existed in and prior to 1776.

This principle is stated by Hall,[16] as follows:

> *"Over the British seas, the King of England claims an absolute dominion and ownership, as Lord Para-*

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[16] *Essay on the Rights of the Crown in the Sea-Shores of the Realm* (first published in 1830), 3d ed., reprinted in Moore, Stuart A., *History and Law of the Foreshore and Sea Shore* (London, 1888), p. 667.

mount, against all the world. Whatever opinions foreign nations may entertain in regard to the validity of such claim, yet *the subjects of the King of England do, by the common law of the realm, acknowledge and declare it to be his ancient and indisputable right.*"

The rights of the original States vested under the common law as it existed in 1776. Up to that time it had been declared in all the English decisions that the King was the owner of a belt of land below low-water mark. (Appendix C.) Even if this common law rule had been abandoned in England in the 19th century, as claimed by plaintiff on the strength of the overruled *dicta* in *Queen v. Keyn,* L. R. 2 Exch. Div. 63 (1876), (which is not the case), it would have no bearing in this case for the rule is that the common law of this country is the common law of England as it existed in that country in and prior to the year 1776 modified only by our constitutions and statutes. *Shively v. Bowlby,* 152 U. S. 1, 14 (1894), states that:

> "The common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country, except so far as it has been modified by the charters, constitutions, statutes or usages of the several colonies and states, or by the Constitution and laws of the United States."

To the same effect: *Cathcart v. Robinson,* 5 Peters 264, 280 (1831).

2. Decisions of American Courts as to the English Common Law.

The common law basis of the Crown's ownership was and is the doctrine that the King is the lord paramount and the original owner of all land under his dominion. Land that never had an individual owner belongs to the

sovereign within whose territory it is situated. This doctrine covered water territory as well as land territory.

No distinction was or is made by the common law as to the nature or character of the Crown's ownership of the bed of the sea on the one hand, and the foreshore and beds of inland tidal waters on the other. In fact, the Crown's ownership of the sea bed was the basis upon which it was held that the Crown owned the foreshore[17] and the beds of rivers so far as they partook of the nature of the sea by being subject to the flow of the tide. [Appendix C, pp. 39-41, 63.]

The Crown's ownership of the sea bed and of the foreshore and beds of tidal rivers, although proprietary in its nature, has been, at least since Magna Charta, subject to the public trust for navigation and fishing. There was thus a double right in the Crown. There was the strictly governmental right *(jus publicum)* under which the Crown held the submerged lands and the foreshore as a public common for navigation and fishery, and the prerogative right (*jus privatum*) under which the Crown held proprietary title to the submerged lands. The nature of the Crown's ownership of tide and submerged lands was therefore entirely different from its ownership of dry lands which were subject to no governmental trust. The public trust could not be destroyed by the Crown, and a grant by the King of his *jus privatum* in submerged lands could only be made subject to the *jus publicum*, or public rights of navigation and fishing. For that reason the ownership of lands under navigable waters was always held to be a necessary incident of sovereignty.

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[17]"Foreshore" in English law means the lands between high and low water marks. [App. C.]

This Court and the courts of our States have repeatedly declared what the common law of England was in 1776 with regard to those rights of the Crown to which the original States succeeded. The following are a few of the leading cases on this subject:

Martin v. Waddell, 16 Pet. 367, 412 (1842), by Mr. Chief Justice Taney:

> "It is said by Hale, in his treatise *de Jure Maris,* Harg. Law Tracts 11, when speaking of the navigable waters, and the sea on the coasts within the jurisdiction of the British crown, 'that although the king is the owner of this great *coast,*[18] and as a consequent of his propriety, hath the primary right of fishing in the sea, and creeks and arms thereof, yet the common people of England have, regularly, a liberty of fishing in the sea, or creeks or arms thereof, as a public common of piscary, and may not, without injury to their right, be restrained of it, unless in such places, creeks or navigable rivers, where either the king or some particular subject hath gained a propriety exclusive of that common liberty.'"

Weber v. Board of Harbor Comm., 85 U. S. 57, 65 (1873), by Mr. Chief Justice Field:

> "By that law [the common law] the title to the shore of the sea, and of the arms of the sea, and in the *soils under tidewaters*[19] is, in England, in the king, and, in this country, in the State."

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[18]The word used by Hale is "waste," here misquoted as "coast."

[19]"Tidewaters" obviously includes the waters of the ocean, all of which are affected by the tides. This Court held in *Manchester v. Massachusetts,* 139 U. S. 240, 258 (1891):

> ". . . the minimum limit of the territorial jurisdiction of a nation over tidewaters is a marine league from its coast . . ."

(Footnote continued on next page)

Shively v. Bowlby, 152 U. S. 1, 13 (1894), by Mr. Justice Gray:

> "In England, from the time of Lord Hale, it has been treated as settled that *the title in the soil of the sea,* or of arms of the sea, below ordinary high water mark, *is in the King,* except so far as an individual or a corporation has acquired rights in it by express grant, or by prescription or usage; [citing cases] and that this title, *jus privatum,* whether in the King or in a subject, is held subject to the public right, *jus publicum,* of navigation and fishing."

Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 65 (1851), by Chief Justice Shaw:

> "By the common law of England, as it stood long before the emigration of our ancestors to this country and the settlement of the colony of Massachusetts, *the title to the land or property in the soil, under the sea,* and over which the tide waters ebbed and flowed, including flats, or the sea-shore, lying between high and low water mark, *was in the king,* as the representative of the sovereign power of the country. But it was held by a rule equally well settled, that this right of property was held by the king in trust, for public uses, established by ancient custom or regulated by law, the principal of which were for fishing and navigation."

See, also, H. A. Marmer, Assistant Chief of the Division of Tides of the United States Coast and Geodetic Survey, *The Tides* (1926), pp. 132, 133.

The term "tidewaters" is not to be confused with "tidelands" which sometimes, but by no means always, is used to refer to the narrow strip of land between high and low tide. See note, Appendix F, p. 118, where "tidelands" is construed by a California court to include submerged lands below low-water mark.

Weston v. Sampson, 62 Mass. (8 Cush.), 346, 351-352 (1851), by Chief Justice Shaw:

> ". . . *the king is held to be owner of the soil under the sea,* which royal right, by the common law of England, extends over the shore where the tide ebbs and flows to ordinary high water mark."

Commonwealth v. Roxbury, 75 Mass. (9 Gray), 451, 482 (1857), by Chief Justice Shaw:

> "We had considered it settled beyond controversy that, by the common law of England, *the right of soil, not only in the sea, the fundus maris, was in the king,* but also in the sea shore, the land between high and low water mark . . . .
>
> * * * * * * * *
>
> ". . . at the time of the granting of the colony charters herein before stated, the king held the sea shores *as well as the land under the sea;* . . . he held the same *publici juris* for the use and benefit of all the subjects, for all useful purposes, the principal of which were navigation, and the fisheries."

People v. New York & S. I. Ferry Co., 68 N. Y. 71, 76 (1877):[20]

> "The title to lands under tide-waters, within the realm of England, were, by the common law, deemed to be vested in the king as a public trust, to subserve and protect the public right to use them as common highways for commerce, trade and intercourse. . . . In the treatise De Jure Maris (p. 22) Lord Hale says: 'The *jus privatum* that is acquired to the subject, either by patent or prescription, must not prejudice the *jus publicum,* wherewith public rivers and arms of the sea are affected to public use;' . . ."

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[20]Quoted with approval by Mr. Justice Field in *Illinois Cent. R. R. Co. v. Illinois*, 146 U. S. 387, 458 (1892).

Rogers v. Jones, 9 N. Y. Com. L. (1 Wend.) 237, 256 (1828):

> "In England, it hath always been holden that the King is lord of the whole shore. He has the property *tam aqua quam soli* and all profits *in the sea,* and all navigable rivers."

Gough v. Bell, 22 N. J. L. (2 Zab.) 441, 455 (1850):

> "The ancient rule of the common law is, that the . . . title to the *shore* between ordinary high and low water mark, *as well as the title to the soil under the water,* belongs, *prima facie,* to the sovereign. *Hale de Jure Maris, part* 1, *cap* 4; *case of the River Banne,* Davies 152; *Woolrich on Waters,* 20; . . ."

Arnold v. Mundy, 6 N. J. L. (1 Halst.), 1, at 74 (1821):

> "Lord Hale says, 'the sea, and the arms of the sea, and the navigable rivers in which the tide ebbs and flows, are of the dominion of the king, as of his proper inheritance; and that this dominion, embraces, also, the shores, . . .'"

Narragansett Real Estate Co. v. McKenzie, 82 Atl. 801, at 810 (R. I., 1912):

> "It is well settled in England that *the title in the bed of the ocean is in the sovereign,* subject to the *jus publicum*—the right of navigation and fishery of which the public cannot be deprived. *In this country, where the people are sovereign, the title to the bed of the ocean is in the state,* which represents the sovereign power; . . ."[21]

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[21]Other cases containing similar statements as to the common law of England are: *New York, B. H. & H. R. Co. v. Horgan,* 56 Atl. 179, at 180 (R. I., 1903); *Armour & Co. v. City of Newport,* 110 Atl. 645, at 646 (R. I., 1920); *Simmons v. French,* 25 Conn. 345, at 351 (1856); *Furman v. City of New York,* 7 New York Superior Court 17, at 33 (1851). There are no authorities to the contrary.

3. English Court Decisions and Treatises.

In view of the numerous decisions of the American courts declaring what the common law of England was as it pertains to the rights of the original thirteen States to lands under navigable waters, it would hardly seem necessary to refer to English authorities on the subject.

However, because plaintiff has placed so much stress on English law, we have prepared (Appendix C) a complete summary of the law as developed in cases and by commentators from the time of Sir Thomas Digges, in 1569, to Lord Shaw of Dunfermline, in 1916. This summary shows that throughout the entire history of England *every court decision in which the question of the ownership of the Crown to the bed of the sea* below low-water mark was involved, *has upheld the Crown's ownership.* This summary also shows that all the great commentators on English law, including Digges, Callis, Coke, Selden, Hale, Blackstone, Chitty, Hall and Sir Cecil Hurst,[22] have unequivocally declared the Crown to have been *at all times* the owner of the bed of the sea, at least out to the three-mile limit.

The principle of the Crown's ownership has been continuously followed and applied in England from the Sixteenth Century to the present day, with no hiatus. The development of the international law concept of the cannon range or three-mile limit on territorial waters is reflected in some of the English decisions in the Nineteenth Century only in the sense of fixing a seaward limit upon the extent of the ocean bed which is owned by the Crown. No new rights emerged, and there was no change in the nature or quality of the Crown's rights in the sea, as a result of the growth of international law.

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[22]Formerly President, Permanent Court of International Justice.

QUEEN V. KEYN.

Plaintiff relies on the dicta of some of the judges in the case of *Queen v. Keyn,* L. R. 2 Exch. Div. 63 (1876), as the primary support for its contention that the English Crown in 1776 had no title to the bed of the marginal sea which could be transmitted to the original thirteen States.

The *Keyn* case is not relevant to the issues in the instant proceeding because:

(a) The sole question there presented was whether the Central Criminal Court of England had jurisdiction to try a *foreigner* for manslaughter committed on board a *foreign ship* sailing within three miles of the English coast. Counsel for plaintiff admit that the issue before the court in the *Keyn* case did not require a decision on the territorial limits of England. (Br. p. 47.)

(b) The majority decision in the *Keyn* case was that the crime was not committed "within the body of the county" as that term was used in English law. The "body of the county" doctrine has no application in American law because the counties of California (and of other coastal States) extend out to the State's boundary in the sea. This precise distinction was made in *Manchester v. Massachusetts,* 139 U. S. at 263-4.[23]

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[23]In the *Manchester* case the Court said:

"It is also contended that the jurisdiction of a State as between it and the United States must be confined to the body of counties; that counties must be defined according to the customary English usage at the time of the adoption of the

(c) This Court, in *Manchester v. Massachusetts, supra,* held the *Keyn* case inapplicable for the further reasons that:

> "* * * there [in *The Queen v. Keyn*] the question was not as to the extent of the dominion of Great Britain over the open sea adjacent to the coast, but only as to the extent of the existing jurisdiction of the Court of Admiralty in England over offenses committed on the open sea; and the decision had nothing to do with the right of control over fisheries in the open sea or in bays or arms of the sea. In all the cases cited in the opinions delivered in *Reg. v. Keyn,* wherever the question of the right of fishery is referred to, it is conceded that the control of fisheries, to the extent of at least a marine league from the shore, belongs to the nation on whose coast the fisheries are prosecuted."[24]

(d) Immediately after the decision of the *Keyn* case the English Parliament "considered it imperative to adopt

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Constitution of the United States; that by this usage counties were bounded by the margin of the open sea; and that, as to bays and arms of the sea extending into the land, only such or such parts were included in counties as were so narrow that objects could be distinctly seen from one shore to the other by the naked eye. But there is no indication that the customary law of England in regard to the boundaries of counties was adopted by the Constitution of the United States as a measure to determine the territorial jurisdiction of the States."

[24]A similar distinction of the *Keyn* case was made by the Ninth Circuit Court of Appeals in *Humbolt Lumber Mfgrs. Assn. v. Christopherson,* 73 Fed. 239, 246 (C. C. A. 9, 1896).

legislation nullifying its effect for the future, besides declaring it wrong as to the past."[25]

(e) Finally, the Privy Council, in the case of *Secretary of State for India v. Chelikani Rama Rao,* 43 L. R. Ind. App. 192 (1916), a case in which the rights of the Crown to the bed of the sea within the three-mile belt were squarely in issue, upheld the Crown's title and repudiated the *dicta* of the *Keyn* case. The decision of Lord Shaw leaves no doubt but that the Crown of England had always owned the bed of the sea to the extent of at least three miles.

[A more detailed analysis of this case is included in Appendix C, pp. 65-73.]

Reference to Appendix C will also show (if, indeed, it needs to be shown) that in the decisions cited under the last head this Court and the State courts have interpreted correctly the meaning and effect of the common law of England.

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[25]*The Collected Papers of John Bassett Moore,* Vol. 7, p. 294.

B. The Original States in 1776 Succeeded to All Rights and Property of the English Crown.

In the previous section it has, we submit, been demonstrated that the English Crown did own lands below low-water mark and outside "inland waters" prior to 1776. The *extent* of the sovereign's ownership will be discussed later. (*Infra*, pp. 174 *et seq.*) We are concerned here only with the principle that such ownership existed.

This Court has repeatedly held that all the rights and properties of the Crown (not theretofore granted) passed on July 4, 1776 to the thirteen States as separate and independent states. *Each state* succeeded to all the rights and properties of the Crown within its own jurisdiction and territory.

A few of the leading cases holding that the States, independently, succeeded to all rights of the Crown are:

Martin v. Waddell, 16 Pet. 367, 410 (1842):

> "For when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to *all their navigable waters and the soils under them*, for their own common use, subject only to the rights since surrendered by the Constitution to the general government."

The above statement is quoted with approval in *Mumford v. Wardwell*, 6 Wall. 423, 436 (1867) and also in *Illinois Central Ry. Co. v. Illinois*, 146 U. S. 387, 456 (1892).

Shively v. Bowlby, 152 U. S. 1, 14-16 (1894):

> "And upon the American Revolution, *all the rights of the Crown and of Parliament vested in the sev-*

eral States, subject to the rights surrendered to the national government by the Constitution of the United States."

Appleby v. City of New York, 271 U. S. 364, 381 (1926):

"Upon the American Revolution, all the proprietary rights of the Crown and Parliament in, and all their dominion over, lands under tidewater vested in the several States, subject to the powers surrendered to the National Government by the Constitution of the United States."

County of St. Clair v. Lovingston, 90 U. S. 46, at 68 (1874):

"By the American Revolution the people of each State, in their sovereign character, acquired the absolute right to all their navigable waters and the soil under them. The shores of navigable waters and the soil under them were not granted by the constitution to the United States, but were reserved to the States respectively."

Massachusetts v. New York, 271 U. S. 65, 85-86 (1926):

"The English possessions in America were claimed by right of discovery. The rights of property and dominion in the lands discovered by those acting under royal authority were held to vest in the Crown, which under the principles of the British Constitution was deemed to hold them as a part of the public domain for the benefit of the nation. Upon these principles rest the various English royal charters and grants of territory on the Continent of North America. *Johnson v. McIntosh,* 8 Wheat. 543, 577 *et seq.,* 595. As a result of the Revolution, the people of each

> State became sovereign and ***in that capacity acquired*** *the rights of the Crown* in the public domain (*Martin v. Waddell,* 16 Peters 367, 410), . . ."

Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 82 (1851):

> "This right of dominion and controlling power over the sea and its coasts, shores, and tide waters, when relinquished by the parent country, must vest somewhere; and, *as between the several states and the United States,* whatever may have been the doubts on the subject, *it is settled that it vested in the several states,* in their sovereign capacity, respectively, ***and was not transferred to the United States by the adoption of the constitution*** intended to form a more perfect union."

People v. Trinity Church, 22 N. Y. 44, 46 (1860):

> "When, by the Revolution, the Colony of New York became separated from the Crown of Great Britain, and a republican government was formed, the People succeeded the King in the ownership of *all lands within the State which had not already been granted away,* . . ."

It would hardly seem that more authority is needed to establish the fact that the States did succeed to all rights of the Crown in navigable waters and the soils under them. Whether some elements of "external sovereignty" may have passed direct to the "United States" as an entity separate from the individual States as claimed by plaintiff, is a different question. Plaintiff makes this assertion (Br. pp. 76-78) upon the authority of *obiter dicta* in *United States v. Curtiss-Wright Export Corporation,* 299 U. S. 304 (1936).

Even if it should be conceded that "external sovereignty" passed from the Crown over the heads of the States to the "United States," it would be immaterial in this case because of the incontrovertible fact that the vesting of external sovereignty in the central government, *from whatever source,* was entirely *unaccompanied by any cession of territory.* The authorities supporting this proposition will be set forth *infra,* pp. 44 *et seq.*

However, in view of the fact that plaintiff places great reliance on the *Curtiss-Wright* case, it should be said that the dictum announced therein, that rights of a sovereign character passed directly from the Crown over the heads of the original States to the incipient Federal Union, is not borne out by the Articles of Confederation or by the contemporary decisions of this Court or the comments of those who took part in the drafting of the Federal Constitution. Inasmuch as we believe the question irrelevant in this case, we do not wish to break the thread of our argument by discussing it at this point. We have, however, cited in Appendix D (pp. 75-78) the authorities which we believe demonstrate that the *dictum* of Mr. Justice Sutherland is contrary to historical fact and legal authority.

There is no justification whatever for plaintiff's assertion (Br. pp. 75-77, 157, n. 23) that the decision of this Court in *Manchester v. Massachusetts, supra,* is overruled by the *Curtiss-Wright* case. The former dealt with the rights of the State within its own boundaries; the latter with powers of the Federal Government in a matter wholly external to the States. (This matter is discussed *infra,* pp. 62 *et seq.*)

C. Colonies and Original States Claimed and Exercised Rights of Ownership in the Marginal Sea.

It is argued by plaintiff that the original States never asserted any claims to the marginal sea prior to 1789. (Br. p. 93.) This argument is based largely on the assertion that no part of the marginal sea was expressly included within the boundaries of the original States as defined by their statutes or constitutions prior to the Massachusetts Act of 1859.

Plaintiff has set forth in its brief (p. 93, *et seq.*) excerpts from the constitutions and statutes of a number of the original States purporting to show that these States did not include the marginal sea within their boundaries. We will show that plaintiff's treatment of them is wholly inadequate and the conclusions drawn therefrom are wholly unwarranted.

It is, of course, true that the precise extent of the seaward boundary of the States was not frequently called into question in the early years of the Republic, but the fact remains that in every instance where that question has arisen, the States have asserted and the courts have held that the territory of the original States extended at least three miles from shore.

In reviewing maritime boundaries and assertions of ownership of the adjacent sea by the colonies and the original States, it is necessary to go back to the colonial charters. To ascertain the significance of those charters as placing the boundaries some distance in the adjacent sea, there are four rules or principles of law that must be borne

in mind—to none of which have counsel for plaintiff given any attention:

1. The marginal sea is an "appurtenance" of the adjoining land territory so that a conveyance of one necessarily conveys the other.[26]

2. Charter grants and government cessions which are bounded "to the ocean" or "along the ocean," etc., impliedly grant the adjoining maritime territory.[27]

3. A Crown grant of "prerogatives" and "royalties" includes the Crown's ownership of maritime territory or adjacent sea.[28]

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[26] "The dominion over navigable waters and property in the soil under them, are so identified with the exercise of the sovereign powers of government that a presumption against their separation from sovereignty must be indulged. . . . It follows that, wherever there is a grant by a State . . . of the rights and title of government and sovereignty over a specified territory, . . . the grant . . . *carries with it, as an incident, title to lands under navigable waters.*" *Massachusetts v. New York*, 271 U. S. 65 (1926).

To the same effect: *United States v. Oregon*, 295 U. S. 1, 14 (1935); *Manchester v. Massachusetts*, 139 U. S. 240, 256 (1891); *The Grisbadarna* (quoted *infra*, p. 182); Scott, *Hague Court Reports* (1916), p. 122; 4 A. J. I. L. 226; I Oppenheim, *International Law* (5th Ed.), pp. 359, 383.

[27] *Pope v. Blanton* (D. C. Fla. 1935), 10 Fed. Supp. 18 (reversed on another point 299 U. S. 521); *Lipscomb v. Gialourakis* (Fla. 1931), 133 So. 104; *State v. Pollock* (Wash., 1925), 239 Pac. 8; *Massachusetts v. New York*, 271 U. S. 65, 89 (1926); *United States v. Oregon*, 295 U. S. 1, 14 (1935).

[28] "By those [colonial] charters . . . the dominion and propriety in the navigable waters, and in the soils under them, passed, as a part of the *prerogative rights* annexed to the political powers conferred . . . the lands under the navigable waters passed to the grantee as one of the *royalties* incident to the power of government; . . ." *Shively v. Bowlby*, 152 U. S. 1, 16 (1894).

4. Even in the absence of a statute, a State's boundary and jurisdiction automatically include the marginal sea.[29]

With these four rules in mind, it is immediately apparent from a study of the language of the colonial charter grants that the "adjoining sea" was conveyed to the colonies both expressly, by inclusion, and as well by legal implication. When the original States succeeded to the rights of the colonies, a number of those States claimed and asserted their rights and titles directly under the early charter grants.

The language in many of the colonial charters and patents expressly conveyed the "adjoining seas." Furthermore, in each colonial charter and patent the "prerogatives" and "royalties" of the Crown were expressly conveyed.

For example, the 1584 Raleigh grant conveyed the

> "Royalties . . . . as well *marine* as other within the saide landes . . . or the seas thereunto adjoyning."

The 1609 Virginia charter conveyed the

> "Royalties . . . both *by sea* and land."

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[29] "Such a statute, however, would be only declaratory of the law . . . the legislature by its act cannot extend the jurisdiction of the state beyond the limits generally recognized by law. *The sovereignty over territorial waters exists even though the state has never seen fit to define their limit.* The State of Maine has exercised this authority as to portions of these waters. . . . There is no reason why it may not assume control over all." *State v. Ruvido* (Maine, 1940), 15 Atl. (2d) 293, 297.

To the same effect: *People ex rel. Mexican Telegraph Co. v. State Tax Commission* (App. Div. 1927), 220 N. Y. S. 8, 18; *People v. Reilly* (1939), 14 N. Y. S. (2d) 589, 592; *Dunham v. Lamphere* (1855), 69 Mass. (3 Gray) 268; *Weston v. Sampson* (1851), 62 Mass. (8 Cush.) 346, 351-353; *Bosarge v. State* (Ala. 1929), 121 So. 427, cert. den. 280 U. S. 568.

The 1611 Virginia charter granted the soils, minerals, etc.

> "both . . . upon the main, and also within said islands and seas adjoining."

Each of the other colonial charters and patents did likewise.[30] (The details of these colonial charters, patents and grants are set forth in Appendix E to this Brief, pages 79-85.)

The American courts have uniformly held that the colonial charters and patents vested the marginal seas in the

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[30]The 1620 Plymouth Company Charter granted the territory "with all the seas . . . royalties . . . within the said islands and seas adjoining."

The 1629 Charter of the Massachusetts area expressly conveyed "the seas thereunto adjoining" as well as the "royalties."

The 1639 Maine grant expressly conveyed all "prerogatives, royalties . . . as well by the sea as by the land."

The 1635 New Hampshire grant expressly conveyed "the seas and islands" and the "royalties . . . within . . . ye Islands & Seas Adjoyning."

The 1662 Connecticut Charter granted all "Royalties . . . and Islands."

The 1663 Rhode Island Charter reserved to British subjects the right to fish on the Rhode Island coast "in any of the seas thereunto adjoining."

The 1663 Charter of the New York-New Jersey-Delaware area expressly conveyed all islands, waters and other

> "Royalties . . . belonging and appertaining with theire and every of theire appurtenances and all our estate . . . in and to the said lands and premises."

The 1632 Maryland Charter expressly conveyed all "Prerogatives, Royalties . . . as well by Sea as by Land."

(Footnote continued on next page)

colonies and their successor states. For example, this Court in 1894 said that:

> "Various charters granted by different monarchs of the Stuart dynasty for large tracts of territory on the Atlantic coast conveyed to the grantees both the territory described and the powers of government, including the property and dominion of lands under tide waters."[31]

In addition, the constitutions and statutes of some of the original States expressly declared their continuing right and title derived from their respective Crown charters or patents. For example, the 1776 North Carolina Constitution declares that all the

> "seas . . . agreeable to the said Charter of King Charles, are the right and property of the people of this state to be held by them in sovereignty."[32]

Furthermore, there is a substantial body of colonial legislation exercising rights of ownership and jurisdiction over the adjoining seas. An illustration is found in the 1671

The 1663 Carolina Charter conveyed the "royalty of the sea upon the coast."

The 1691 Massachusetts Bay Charter conveyed all the "Royalties . . . upon the Main and also within the Islands and Seas adjoyning."

The 1732 Georgia Charter conveyed the land area and also "the islands on the sea" within twenty leagues of the coast as well as all "gulfs and bays" and "royalties . . . in any sort belonging or appertaining . . . and in as ample manner . . . as we . . . have hitherto granted to any company."

[31] *Shively v. Bowlby*, 152 U. S. 1, 14 (1894); see also *Martin v. Waddell*, 16 Peters 367, 412 (1842).

[32] The details of these constitutions and statutes are set forth in Appendix E hereto.

Plymouth General Court enactment that all whales cast up within the boundaries of a township or floating

> "within a Mile of the Shoar"

belong to the township.[33]

Immediately following the formation of the original States, each of them commenced and continued to enact legislation exercising rights of ownership and jurisdiction in the marginal sea, one example being a 1798 Act of the Rhode Island General Assembly prohibiting any person from keeping more than two lobster pots

> "upon or within three miles of any of the shores of this state."[34]

Both in colonial legislation and in early State legislation, county and town coastal boundaries in many of the States were set forth, most of them bounded "by the sea" or "along the sea" and also "including all islands" adjoining the coast.[35] When these county and town coastal boundaries are read in the light of the accepted rules of interpretation mentioned above, it is readily seen that the boundaries thereof included the adjoining sea.

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[33]Further examples of and citations to this body of colonial legislation are set forth in Appendix E to this Brief.

[34]Other examples of and citations to typical legislation of this character are set forth in Appendix E to this Brief.

[35]Citations to and details of these coastal county and town boundaries are set forth in Appendix E hereto.

In addition, *there are three-mile statutes in every coastal Original State.*[36]

The inescapable conclusion from an examination of the relevant historical facts is that the American colonies and the original States from earliest times claimed and continued to assert their ownership of their adjoining sea, ultimately in each instance defining the extent of the adjacent sea at the three-mile limit.

As early as 1804 this Court recognized that a belt of the sea within range of a cannon-shot was a part of the "territory" of the United States. In *Church v. Hubbart,* 2 Cranch. 187, 234 (1804), Chief Justice Marshall, in his monumental opinion, stated:

> "The authority of a nation, *within its own territory,* is absolute and exclusive. The seizure of a vessel, *within the range of its cannon,* by a foreign force, is an invasion of *that territory,* and is a hostile act which it is its duty to repel."[37]

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[36]Five of the eleven coastal Original States have specific boundary statutes extending into the sea one marine league or three miles from the coast, being Massachusetts (1859), Rhode Island (1872), New Hampshire (1901), New Jersey (1906), Georgia (1916), (and Maine (1916) might be added, as it was a part of Massachusetts until 1820).

All the other coastal Original States have specific 3-mile statutes regulating fishery rights within three miles of their respective coasts, being North Carolina (1911), New York (1925), Delaware (1931), Virginia (1936), South Carolina (1924), and Maryland (1945).

The details of and citations to these three-mile statutes are set forth in Appendix E hereto.

[37]See other authorities under section on Development of Marginal Sea Doctrine, *infra,* pp. 174 *et seq.*

In this statement the Court was not laying down any new law or annexing any territory. It was simply declaring the then well accepted principle that a belt of the sea was part of the territory of the littoral state.

At the time of the Declaration of Independence

> "There was no territory within the United States that was claimed in any other right than that of some of the confederated states; . . ."[38]

When the Court said in 1804 that a belt of the sea was a part of the territory of the United States, it follows that it was also part of the territory of the original States. No other conclusion is possible unless it be assumed that after its creation in 1789 the United States annexed a belt of territory below low-water mark which was not within the boundaries of the original States. But no such annexation could have been made either by court decisions or by declarations of the President or Secretary of State. Territory cannot be annexed to and made part of the United States except by Act of Congress. Congress never has passed such an act. This point is fully discussed and authorities set forth *infra*, pp. 188-191.

It is, therefore, definitely established both by the acts of the States themselves and by the decisions of this Court that the territorial jurisdiction of the original States extended at least a cannon-shot from their shores.

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[38] *Harcourt v. Gaillard*, 12 Wheat. 523 (1827).

D. The Original States Never Ceded to the Federal Government the Lands Beneath Navigable Waters Within Their Respective Boundaries.

1. Confederated States Collectively Owned No Land.

When the Confederation was formed it owned no land either within or without the jurisdiction or territory of the thirteen States. Indeed, the Articles of Confederation (Art. IX) specifically provided that

> ". . . no state shall be deprived of territory for the benefit of the United States."

Commencing in 1781, various States executed deeds conveying to the "congress of the Confederation" large areas of land known as "The Northwest Territory."[39] It is important to note that the original deeds of cession

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[39]Appendix to Answer, pp. 59-64.

As to the Appendix to Answer counsel for the United States have failed to mention what is perhaps the most important part of the stipulation entered into between plaintiff and defendant resulting from the pre-trial conference mentioned in note 2 on pp. 5-6 of their Brief and approved by Court order. This omitted part reads as follows:

> "Provided, further, that the Court may consider all matters and facts alleged in said Appendix to the extent permissible by judicial notice, with opportunity on the part of the plaintiff to object at any stage of the litigation to the correctness or relevancy of any of the matters and facts set forth in said Appendix, and with further opportunity on the part of both parties to prove such facts or any other facts which the Court may determine to be material and not susceptible of judicial notice."

It will be observed that counsel for plaintiff have in this brief discussed substantial portions of the facts alleged in the Appendix to Answer and have not objected to the relevance of any of the facts alleged in the Answer. The Appendix to Answer therefore constitutes the factual basis upon which the case is now being presented to the Supreme Court.

conveyed "title, ownership and jurisdiction" over the areas described, thus indicating that the original States acted upon the assumption that in the first instance *ownership was united with jurisdiction,* a basic principle uniformly upheld by this Court (*infra,* pp. 50 *et seq.*)

These deeds of cession were "for the benefit of future states." With this end in view the Continental Congress enacted the Resolutions of 1784 and 1787 [App. to Ans. pp. 62-63] providing for the government of the Northwest Territory and for the admission of new States "on an equal footing with the original States," a clause subsequently to be included in the Act of Admission of every new State. Indeed, this clause expresses one of the basic principles of the Federal Union—a principle described by this Court as "The constitutional principle of the equality of states."[40]

2. The Constitution Contained No Cession of Territory.

It may be safely said that at the time of the adoption of the Constitution the framers were of the opinion that the Federal Government owned no land within the jurisdiction and territory of any State. If title to lands had passed directly from the Crown to the Union in 1776, the framers of the Constitution were not aware of

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[40]*United States v. Utah,* 283 U. S. 64, 75 (1931).

it. They viewed the United States as being composed solely of the territory of the original thirteen States.

> "The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively"

Pollard v. Hagan, 3 How. 212, 230 (1845). *County of St. Clair v. Lovingston,* 90 U. S. 46, 64 (1874). *United States v. Bevans,* 3 Wheat. 336, 338 (1818). (See further discussion on this point *infra,* pp. 51 *et seq.*)

The framers of the Constitution of course realized that the Federal Government would need to own land within the territory of the States. It was because of this fact that they found it necessary to provide for the acquisition of territory in Article I, Section 8, Clause 17 of the Constitution, which reads:

> "The Congress shall have power . . .
>
> "To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square), as may, by Cession of particular States, and the Acceptance of Congress, became the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dockyards, and other needful Buildings; . . ."

So far as we can discover, there are only four possible ways by which the Federal Government can acquire land within a state. Two of these are mentioned in Clause 17, *i. e.:*

(1) Cession by the States of a district 10 miles square as the seat of Government;

(2) Purchase of land by the consent of the State in which the same shall be.

In addition to these, the courts have recognized that the Federal Government has implied power to acquire land within a State in two other ways, namely:

(3) Purchase (including condemnation) from individual owners without the consent of the State; and

(4) In case of new States created out of territory held by the United States, by reservation in the Acts of Admission of specific land not incident to State sovereignty.

That these are the only methods by which the Federal Government can acquire land *within a State* is borne out by several decisions which discuss and interpret Clause 17.[40a]

It is obvious that the Federal Government did not acquire any lands beneath the three-mile belt *of the original States* in any of the ways above mentioned.

[40a] *Fort Leavenworth R. R. Co. v. Lowe,* 114 U. S. 525 (1885); *Williams v. Arlington Hotel Co.,* 22 F. (2d) 669 (C. C. A. 8, 1927).

E. Original States Own All Lands Within Their Respective Jurisdictions (Not Previously Granted) Including All Lands Beneath Navigable Waters.

1. Original and Ultimate Ownership Is in the States.

The ownership by the sovereign of all land (not previously granted) within its jurisdiction is one of those principles of law so elementary that it may be easily overlooked. Yet it is fundamental in this case. The original States adopted the English common law as their law. The common law rule is stated in Bacon's Abridgement:[41]

> "The king by our law is universal occupant, and all property is presumed to have been originally in the crown . . ."

The principle is expressed by Hall,[42] as follows:

> " 'The title of the King of England to the land or soil *aqua maris cooperata,* is similar to his ancient title to all the *terra firma* in his dominions, as the first and original proprietor and lord paramount. It is a fundamental principle of our laws of property in land, *that all the lands in the realm belonged originally to the King;* . . ."

The principle was applied to submerged lands in the English case of *Benest v. Pipon*[43] in which the Privy Council stated:

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[41]Edition by Bouvier (Philadelphia 1869), Vol. 8, p. 13.

[42]*Essay on the Rights of the Crown in the Sea-shore of the Realm,* reprinted in Moore, *supra,* pp. 670-671.

[43]1 Knapp 60, 12 Eng. Rep. 243 (1829).

> "What never has had an individual owner belongs to the sovereign within whose territory it is situated . . ."

This Court recognized that principle in the case of *Johnson v. McIntosh*, 8 Wheat. 543, 595 (1823), where it is said:

> "According to the theory of the British constitution, all vacant lands are vested in the crown, . . . this principle was as fully recognized in America as in the islands of Great Britain."

Again, in *Georgia v. Stanton*, 6 Wall. 50, 73 (1867), this Court makes the following succinct statement:

> "The right of property was undoubtedly involved; as in this country, where feudal tenures are abolished, in cases of escheat, the State takes the place of the feudal lord, by virtue of its sovereignty, *as the original and ultimate proprietor of all the lands within its jurisdiction.*"

The decision in *Georgia v. Stanton* follows very closely the statement in Kent's *Commentaries*:[44]

> ". . . as the feudal tenures do not exist in this country, there are no private persons who succeed to the inheritance by escheat; and the *state* steps in the place of the feudal lord, by virtue of its sovereignty, *as the original and ultimate proprietor of all the lands within its jurisdiction.*"

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[44]Vol. 4, p. 470 (11th ed. edited by Oliver Wendell Holmes).

This principle is embodied in the constitutions and statutes of many of our States. For example, the New York Constitution declares that

> "The People of this State in their right of sovereignty are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the State; . . ."

This is quoted in *People v. Trinity Church*, 22 N. Y. 44, 46 (1860). In commenting upon this provision the New York Court of Appeals said:

> ". . . The People *'are deemed,'*[45] . . . to possess the original, and ultimate property, &c; in other words, all private titles are held from them as the political sovereignty, as in England all lands are held under the Crown in the same sense."

The court pointed out that this constitutional provision was not a new enactment but

> "simply declaratory of these principles as fixed and unalterable rules of public law." (p. 47.)

It is important to bear in mind that the court is talking about the People *of the State*. The fundamental meaning of this principle is stated by the court as follows (p. 47):

> ". . . By whatever name we may call the highest estate of an individual known to our laws, there is a theoretical title in the State of a still higher nature, to which the right of possession and enjoyment become annexed on the failure of the inheritance. This is the *'original and ultimate property'* spoken of in the Constitution."

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[45]Italics are the court's.

2. Jurisdiction, Territory and Ownership Are Coextensive.

The application of the principle above set forth is especially clear in the case of the original thirteen States because these States existed before the Federal Government was formed. It is, of course, true that large areas of land within these States had been granted by the prior sovereign and remained in the possession of their owners under the new sovereign. But no questions are raised as to the Original States such as those raised in connection with the Acts admitting new States to the Union. When the original States became independent there was no reservation to anyone of the primary disposal of the public lands. Persons holding land under valid grants continued to hold such land, but all other lands necessarily vested in the new sovereign whose ownership was, therefore (except as to such prior grants) fully *co-extensive with its territorial jurisdiction.* Since it has been demonstrated that the territorial jursdiction of the original States included a belt of the sea, it follows indubitably that the original States must have owned the bed of this belt of marginal sea. And since, as we have shown, they did not cede it to the Federal Government, they must continue to own it.

The principles we have been discussing, namely, (1) that the ownership of the original States in the bed of the sea was and is co-extensive with their territorial jurisdictions, and (2) that such lands were not ceded to the Federal Government, have been expressly stated by this Court in many decisions and are implicit in the rulings of

the Court in all its decisions dealing with the ownership of lands beneath navigable waters.

We propose now to take up a series of decisions illustrative of the application of both these principles by this Court.

(a) NEW YORK v. CONNECTICUT, 4 DALL. 1 (1799).

This case involved title to a strip of land claimed by both States, and both States had made grants to individuals within the disputed territory. In other words, the land had, in the first instance, belonged either to one or the other of the two States. The attorney general for New York argued that the case involved not only the question of the jurisdiction of the respective states but

> ". . . it involves the right of soil, which, in relation to a great part of New York, results from the right of jurisdiction; so that, deciding the latter, is virtually a decision of the former." (p. 4.)

There was no final decision in the case but the reported decision quotes Justice Patterson as stating in the course of the argument that

> "Generally speaking, the proposition is true, that as to states, *jurisdiction and the right of soil go together.*" (p. 4, note (b).)

(b) UNITED STATES v. BEVANS, 3 WHEAT. 336 (1818).

This case involved the jurisdiction of Massachusetts to prosecute for the crime of murder committed on a ship in Boston Harbor some distance from the land. The decision is of vital importance as showing the relationship

between jurisdiction, territory and ownership. The court, by Chief Justice Marshall, held (pp. 386-387):

> ". . . What then is the extent of jurisdiction which a state possesses? We answer, without hesitation, the jurisdiction of a state is co-extensive with its territory; co-extensive with its legislative power. The place described is unquestionably *within the original territory of Massachusetts.* It is, then, within the jurisdiction of Massachusetts, unless that jurisdiction has been ceded to the United States."

The argument made in the *Bevans* case was basically the same as that advanced by plaintiff in the present case, namely, that there is something inherent in the distribution of powers under the Constitution between the States and the Federal Government (Br. pp. *72 et seq.*) which gives the Federal Government title to the lands beneath navigable waters. In the *Bevans* case the argument was that the vesting of admiralty and maritime jurisdiction in the Federal Government was an actual cession of the waters of the State which would have given the Federal Government exclusive jurisdiction over the offense charged. In response to this Chief Justice Marshall said (p. 388):

> "Can the cession of all cases of admiralty and maritime jurisdiction be construed into a cession of the waters on which those cases may arise? This is a question on which the court is incapable of feeling a doubt. The article which describes the judicial power of the United States *is not intended for the cession of territory,* or of general jurisdiction. It is obviously designed for other purposes. It is in the

> *8th section of the 2d article,*[46] *we are to look for cessions of territory* and of exclusive jurisdiction. . . . It is observable, that the power of exclusive legislation (which is jurisdiction) is united with *cession of territory, which is to be the free act of the states.*"

It is clear from the above quotation that the ownership of territory and general jurisdiction of the State were, in the first instance, co-extensive.

The reason Chief Justice Marshall said that the constitutional grant of admiralty and maritime jurisdiction to the Federal Government was not a cession of territory was to negative the claim that the United States had general political jurisdiction over the area in question. The holding that the territory had not been ceded to the United States was, therefore, not *dictum,* but was necessary to the decision of the case. If Boston Harbor belonged to the United States, it would have had jurisdiction. The Court had to determine that there was no ownership in the United States in order to determine that the United States had no jurisdiction.

It is of course true that, in the words of the decision, the offense in the *Bevans* case took place within a harbor. In view of the fact that plaintiff in this case does not concede that Massachusetts Bay is a "true bay" (Br. p. 254), plaintiff is certainly not in a position to say that the effect of this decision is limited to "inland waters." However, for the purpose of this discussion we may assume that the offense in the *Bevans* case was committed within a "true" harbor. The fact remains that the

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[46]The reference to the 2d article is obviously a textual error; the article referred to is the 1st article.

decision was not predicated upon any distinction between inland waters and marginal sea. The essence of the decision is that constitutional grants of power involve no cession of territory. If this principle is applicable in Boston Harbor it must be applicable anywhere within the State's territorial jurisdiction. And if this principle is applicable to grants of admiralty and maritime jurisdiction, it must also be applicable to grants to the Federal Government of other powers, *whether external or internal in character*. Furthermore, when Chief Justice Marshall said that there had been no cession of territory by the State, he must have believed that the State could have made a cession. If the State had no title to cede, the statement that it had made no cession would have been meaningless. Implicit in this decision is the basic proposition above stated, that the State of Massachusetts owned all the lands within its territorial jurisdiction not previously granted to other parties.

(c) CORFIELD V. CORYELL, 6 FED CAS. No. 3,230, P. 546 (1823).

The principle thus announced by Chief Justice Marshall has been followed with respect to other powers vested in the Federal Government by the Constitution. An early decision on this point is *Corfield v. Coryell*, 6 Fed. Cas. No. 3,230, p. 546. This case involved the validity of a statute of New Jersey regulating the taking of oysters within the *waters of the state*.

Again, in this case, argument similar to that made by plaintiff here was advanced, namely, that constitutional grants of power to Congress to regulate interstate and foreign commerce gave the Federal Government paramount power over the waters within the State of New

Jersey. It was in regard to this point that Mr. Justice Washington said (p. 551):

> ". . . The grant to congress to regulate commerce on the *navigable waters belonging to the several states,* renders those waters the public property of the United States, for all the purposes of navigation and commercial intercourse; subject only to congressional regulation. *But this grant contains no cession, either express or implied, of territory, or of public or private property.*"[47]

In this case, as in the *Bevans* case, the ground of the decision was not that the act was committed in a bay, but that it was committed within the territory of the State and that there had been no cession of that territory to the Federal Government.[48]

(d) RHODE ISLAND v. MASSACHUSETTS, 12 PET. 657 (1838).

An important application of the principles of the *Bevans* and *Corfield* cases was made by this Court in the case of *Rhode Island v. Massachusetts,* which appears in the Supreme Court reports eight times. In the third reported decision, 12 Pet. 657, 733 (1838), the argument was advanced that ownership of land by the State depended on whether or not the land was within the State's jurisdiction which, in turn, depended on the location of

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[47]Followed with approval by this Court on several occasions: *Smith v. Maryland,* 18 How. 71, 74 (1855); *Manchester v. Massachusetts,* 139 U. S. 240, 262 (1891).

[48]In *Corfield v. Coryell* (p. 546) the Attorney General of New Jersey asserted that the "territorial jurisdiction" of New Jersey extended "on the sea, to at least a marine league," and the Act under consideration applied to all the "waters of the state."

the State's boundary. On this question the court said, relating to the disputed boundary line (pp. 733-734):

> "The locality of that line is matter of fact, and when ascertained, separates the territory of one from the other; for neither state can have any right beyond its territorial boundary. It follows, that when a place is within the boundary, it is a part of the territory of a state; *title, jurisdiction and sovereignty are inseparable incidents, and remain so, till the state makes some cession.* The plain language of this court in the *United States v. Bevans*, 3 Wheat. 386 *et seq.*, saves the necessity of any reasoning on this subject * * * *Title, jurisdiction, sovereignty, are, therefore, dependent questions, necessarily settled, when boundary is ascertained, which, being the line of territory, is the line of power over it;* . . ."

This decision demonstrates that the principles of the *Bevans* case govern the question of ownership as well as jurisdiction. Thus, the ownership of lands by a State (except as they have been granted out) is co-extensive with the State's jurisdiction.

(e) MARTIN v. WADDELL, 16 PET. 366 (1842).

In this case the Court explicitly applied the principle under discussion, that all lands within the jurisdiction of the State not previously granted belong to the State.

> ". . . According to the theory of the British constitution, all vacant lands are vested in the crown, as representing the nation, and the exclusive power to grant them is admitted to reside in the crown, as a branch of the royal prerogative. It has been already shown, that this principle was as fully recognized in America as in the island of Great Britain." (p. 410.)

Upon this fundamental ground the Court held that the people of the State of New Jersey (p. 410)[49]

> ". . . hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government."

(f) POLLARD'S LESSEE v. HAGAN, 3 How. 212 (1845).

We shall discuss this case later in connection with the discussion of the effect of the reservation in the Acts admitting new States to the Union of the "primary disposal of the public lands." At this point we desire to refer only to the fact that the decision in this case is predicated on the same fundamental principle that ownership by the State is co-extensive with its jurisdiction. On this point the Court said (p. 228):

> "Alabama, is, therefore entitled to the sovereignty and jurisdiction over *all the territory within her limits,* . . ."

Sovereignty and jurisdiction were held to include ownership and upon this principle the Court held, on the authority of *Martin v. Waddell* (p. 229) that

> ". . . to Alabama belong the navigable waters, and soils under them . . ."

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[49]This case involved land in Raritan Bay, but it is doubtful whether Raritan Bay is a "true bay" as that term is used by plaintiff. However, assuming it to be a "true bay," the decision was not predicated on that fact but on the fundamental fact that the land was under navigable waters *within the territory of the State.*

(g) DUNHAM v. LAMPHERE, 69 Mass. (3 GRAY) 268 (1855).[50]

This case involved the validity of a Massachusetts statute regulating the taking of fish in "the open sea," "within one mile of Gravel Island." The first question was whether the act took place *within the territory of the State.* On this question the court said, by Shaw, Chief Justice (p. 269):

> *"Being within a mile of the shore puts it beyond doubt that it was within the territorial limits of the State,* although there might in many cases be some difficulty in ascertaining precisely where that limit is. We suppose the rule to be, *that these limits extend a marine league, or three geographical miles, from the shore;* . . ."

The court then considered the question whether

> ". . . the right both of *property and dominion over the sea-shore, within the territorial limits* of a sovereign state, and all its incidents—navigation, fishing and all other incidental benefits— . . . belong properly to the general government or remain with the state government" (pp. 271-2).

The court answered this question unequivocally by holding that dominion and control over these waters, when relinquished by the government of Great Britain, did

> "fully and absolutely vest in the several states. This had been definitely settled by the supreme court of the United States." (Citing *Pollard v. Hagan.*)

It is vitally important to note that here the court applied the principle that ownership is co-extensive with jur-

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[50]Decided four years before Massachusetts statute fixing seaward boundary of Massachusetts at 3 miles from shore.

isdiction in lands beneath the open sea within the three-mile belt, basing its decision on the authority of *Pollard v. Hagan.*

The question at once arises: Why did the court cite *Pollard v. Hagan,* which is a case involving only the question of *ownership,* as authority in a case involving only the question of *jurisdiction?* And the answer is that jurisdiction and ownership by a state of land within its boundaries are based on the same fundamental principle. If the state owned the property it had jurisdiction. *Pollard v. Hagan* was cited to show that the state did own the area in question.[51] But the converse is equally true. If the state has jurisdiction it likewise has ownership (except as it has been granted away.)[52] And since the state has jurisdiction to the limits of its territorial boundaries, so it has ownership to the same limits. The inland waters and the high and low tides are false quantities in the problem. The controlling factors are (1) that the land in question is within the boundaries of the state, and (2) such land has not been granted or ceded to the Federal Government.

(h) COMMONWEALTH OF MASSACHUSETTS V. MANCHESTER, 152 MASS. 230, 9 L. R. A. 236 (1890).

This case involved the validity of a statute regulating the use of nets or seines for taking fish in the waters of

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[51]The reference to *Pollard v. Hagan,* shows that the Massachusets court did not consider that the principle of *Pollard v. Hagan* was limited to "inland waters."

[52]It must be borne in mind that we are now considering the ownership of lands beneath the marginal sea within the *original States,* so no question is involved of the effect of a reservation of lands over which the State might have jurisdiction without ownership. The effect of such a reservation will be considered in connection with the Act of Admission of California and other new States.

Buzzard's Bay.[53] The decision was rendered in 1890 by a unanimous court, of which Mr. Justice Holmes was then a member, the opinion being written by Chief Justice Field.

The court was asked to overrule *Dunham v. Lamphere* but refused to do so. The principle of *Dunham v. Lamphere* was followed as the controlling authority.

It is important to note that the arguments of defendant in the *Manchester* case were strikingly similar to those of plaintiff in the present case, both as to the rights derived from "the position of the national sovereign" and also as to the superior right of the Federal Government to control the fisheries. Plaintiff in the present case asserts (Br. p. 87) that.

> ". . . the exlusive right to take the fish found in the waters bordering the littoral nation is, for its full enjoyment, largely dependent upon the powers of the United States."

This is one phase of plaintiff's argument that the United States, by performing its constitutional duties, can acquire rights for itself *as against the States*. The argument in the *Manchester* case was essentially the same. Manchester's position and the court's answer to it are set forth in the following quotation (9 L. R. A. 241):

> "But it is argued that if the fisheries of Buzzard's Bay are within the control of either the State of Massachusetts or of the United States, this control by the Constitution of the United States is exclusively with the United States. The question is therefore whether

[53] We may assume, for the purpose of this discussion, that Buzzard's Bay would be classed as "inland water" although it was strenuously argued that Buzzard's Bay was, in a legal sense, "open sea."

> the Statutes of Massachusetts which have been cited are repugnant to the Constitution and laws of the United States. *There is no belt of land under the sea adjacent to the coast which is the property of the United States and not the property of the States.*"

Here we have a definite and unqualified statement by a Court comprised of such able jurists as Chief Justice Shaw and Justice Holmes that the United States owns no belt of land adjacent to the coast of any State. It is difficult to believe that this Court did not know what it was talking about when it made this statement. Furthermore, this statement was not *obiter dictum,* for the same reasons that Chief Justice Marshall's statements regarding the cession of territory in *United States v. Bevans* were not *obiter dicta.* The statement was made as an answer to Manchester's contention that the control of fisheries was vested in the Federal Government by the Constitution. Therefore, although the *Manchester* case is a jurisdictional case, the court had to find that the United States did not own the land under the sea in order to negative the possibility that jurisdiction was in the United States.

The fact that the case of *Dunham v. Lamphere* involved the open sea, whereas the *Manchester* case involved Buzzard's Bay, is vitally important when it is seen that *both cases are decided upon the same principle,* namely, that the offense was committed within "the territorial limits of the State, ..." The ruling which pertained to the open sea was used as authority for the case which arose in Buzzard's Bay. It would be hard to find stronger evidence of the proposition that there are no "pivotal" or "crucial"[54] distinctions between these waters by reason of

[54] Plaintiff's Br. pp. 9, 66.

which one is vested in the Federal Government and the other in the State, as asserted by plaintiff in this case.

(i) MANCHESTER v. MASSACHUSETTS, 139 U. S. 240 (1891).

In the above case this Court affirmed in all particulars the decision of the Massachusetts court just discussed. Again, the striking similarity between the contention of Manchester and those of plaintiff in the present case will be observed. The Court sums up the arguments for Manchester in the first paragraph of the decision, as follows (p. 254):

> "The principal contentions in this court on the part of the defendant are that, . . . when she [Massachusetts] became one of the United States, she surrendered to the general government her right of control over the fisheries of the ocean, and *transferred to it her rights over the waters adjacent to the coast and a part of the ocean;* that, as by the Constitution, article 3, section 2, the judicial power of the United States is made to extend to *all cases of admiralty and maritime jurisdiction,* it is consistent only with that view that the rights in respect of fisheries should be regarded as *national rights,* and be enforced only in national courts; that the *proprietary right* of Massachusetts is confined to the *body of the county;* that the offense committed by the defendant was committed *outside of that territory, in a locality where legislative control did not rest upon title in the soil and waters,* but upon rights of sovereignty inseparably connected *with national character* . . ."

Further to see the significance of these contentions, it is important to quote from the brief of plaintiff in error,

apparently written by Joseph H. Choate. From this brief we quote the following (pp. 8-9):

> "Our argument is that the territory of Massachusetts was defined under the law of England, and that when she adopted the Constitution her domain was limited, as far as proprietary title is concerned, by the body of the county, in accordance with the established principles of that law.
>
> "It was *without this territory* that the offense with which Manchester is charged took place, in a locality where legislative control did not rest upon title in the soil and waters, *but upon rights of sovereignty inseparably connected with national character* . . ."

This Court rejected the entire argument that Federal control rested upon rights "inseparably connected with national character" and applied the principle of *United States v. Bevans* and other decisions which hold that the vesting of sovereign powers in the Federal Government did not constitute a cession of territory (139 U. S. pp. 260, 261, 263, 264).

In support of the argument that Massachusetts had no jurisdiction below low-water mark, Mr. Choate also relied on the case of *Queen v. Keyn*. As we have stated, (*supra*, pp. 28-29), this Court in the *Manchester* case held the *Keyn* case to be wholly inapplicable.

Two important cases relied upon by the Court in the *Manchester* case were *Smith v. Maryland* and *McCready v. Virginia*. The following brief quotations from these cases show that in both of them the Court applied the principle that the original States own the beds of all navigable waters within their limits.

(j) SMITH v. MARYLAND, 18 How. 71, 74 (1855):

"Whatever soil below low-water mark is the subject of exclusive propriety and ownership, belongs to the State on whose maritime border, and within whose territory it lies, subject to any lawful grants of that soil by the State, or the sovereign power which governed its territory before the declaration of independdence. Pollard's Lessee v. Hagan, 3 How. 212; Martin v. Waddell, 16 Pet. 367; Den v. The Jersey Co., 15 How. 426.

"But this soil is held by the State, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shellfish as floating fish. Martin v. Waddell; Den v. Jersey Co.; Corfield v. Coryell, 4 Wash. R. 376; Fleet v. Hagemen, 14 Wend. 42; Arnold v. Munday, 1 Halst. 1; Parker v. Cutler Milldam Corporation, 2 Appleton (Me.) R. 353; Peck v. Lockwood, 5 Day. 22; Weston et al. v. Sampson, et al., 8 Cush. 347. The State holds the propriety of this soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery. In other words, it may forbid all such acts as would render the public right less valuable, or destroy it altogether. *This power results from the ownership of the soil, from the legislative jurisdiction of the State over it,* and from its duty to preserve unimpaired those public uses for which the soil is held. Vattel, b. 1, c. 20, s. 246; Corfield v. Coryell, 4 Wash. R. 376. It has been exercised by

many of the States. See Angell on Tide Waters, 145, 156, 170, 192-3."

(k) McCready v. Virginia, 94 U. S. 391, 394 (1876):

"The principle has long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. *Pollard's Lessee v. Hagan,* 3 How. 212; *Smith v. Maryland,* 18 How. 74; *Mumford v. Wardwell,* 6 Wall. 436; *Weber v. Harbor Commissioners,* 18 *id.* 66. In like manner, the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. *Martin v. Waddell,* 16 Pet. 410."

We submit that plaintiff's contention that the original States did not own lands within the three-mile belt at the time of the formation of the United States has been conclusively answered by the foregoing authorities. They also furnish a conclusive answer to plaintiff's argument "that ownership of the submerged lands . . . if an attribute of sovereignty, is an attribute of national rather than local sovereignty."[55] This argument, as we pointed out, was rejected by this Court in *United States v. Bevans, Manchester v. Massachusetts,* and other cases previously discussed.

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[55]Plaintiff's Br. pp. 9-10; 72-73; 89.

F. Lands Beneath Navigable Waters Are Held by the States by Virtue of, and as an Incident to, State Sovereignty.

We pass now to the alternative argument of plaintiff (Br. p. 143, *et seq.*) that "ownership of the submerged lands is not an attribute of sovereignty at all within the meaning of the equal footing clause."

It is of course true that in the broadest sense every act of the sovereign is done by virtue of its sovereignty and all property which the sovereign possesses is held by it as sovereign, or, in other words, as the governing power. When it is said that a State holds some property in a proprietary capacity and other property as an attribute of sovereignty, it is a convenient way of saying that the legal results (*i. e.*, obligations and duties) which flow from the ownership of one type of property are different from the legal results which flow from ownership of the other type of property. The real question is whether such differences do exist and whether they are based on valid and substantial grounds. If so, it is immaterial whether we describe one type of legal result by calling it an attribute of sovereignty and the other by calling it proprietary, although this has been the practice of the courts from time immemorial, as we shall show.

There are many instances in which the governmental ownership of dry land does not involve any treatment that is substantially different from that required for similar land held by private individuals, and hence it is said that the sovereign owns such land "as a proprietor." But the ownership of navigable waters, because of their nature as highways of commerce and as the source of the common right of fishery, calls for the exercise of govern-

mental powers and duties which are different both in kind and degree from those powers which need to be exercised in relation to dry land. It was this doctrine which gave rise to the terminology *jus privatum* and *jus publicum*, used by Lord Hale [Appendix C, pp. 45-46], which simply meant that although the King owned the land as a proprietor, he held it subject to the public trust and that the administration of this trust was a necessary governmental duty or function.

This principle that lands beneath navigable waters are subject to these common rights of fishery and navigation has been consistently applied by the English courts from the earliest times to the present, as we show in the outline of the English decisions [see App. C, pp. 39-65].

The same principle of course applied when the original States succeeded to the rights of the Crown. They succeeded to the Crown's proprietary right in the bed of the sea but they also assumed, as sovereigns, the governmental function of protecting and regulating the public trust, that is, of protecting and regulating the rights of the public in the use of the navigable waters for fishery and commerce. That is the factual and historical basis of the rule that the ownership of navigable waters vests in the State by virtue of its sovereignty.

The cases already cited show that the States' ownership of lands beneath navigable waters is in the *capacity of sovereign* in a sense different from its ownership of dry land. This was stated in *Martin v. Waddell, Pollard v. Hagan*, and, indeed, in all the cases cited *supra*, pp. 51-65. No better statement of the principle can be found than that in the opinion of this Court by Mr. Jus-

tice Stone in *Massachusetts v. New York*, 271 U. S. 65, 89 (1926):

> ". . . The dominion over *navigable waters*, and property in *the soil under them*, are so identified with the exercise of the sovereign powers of government that *a presumption against their separation from sovereignty must be indulged*, . . ."

The same statement appears in *United States v. Oregon*, 295 U. S. 1, 14 (1935).

It is important to note that in these decisions the Court held that the dominion over navigable waters was identified with the sovereign powers of *state* government, not of the Federal Government. Yet plaintiff cites these very cases as holding that:

> "The presumption would be against any intention *of Congress* to sever the title from the sovereignty of *the United States* to which it was annexed. Cf. *Massachusetts v. New York*, 271 U. S. 65, 89; *United States v. Oregon*, 295 U. S. 1, 14." (Br. p. 73.)

What this Court holds to be a presumption against the separation of dominion over lands under navigable waters from *state sovereignty*, plaintiff advances as an argument against the separation of such lands from the *sovereignty of the United States*.

The *Massachusetts* case is also of importance because it deals with the bed of Lake Ontario, the center of which constitutes the international boundary between the United States and Canada. The State is held to be the owner of the bed of that lake to the international boundary.

If there was any national interest which called for Federal ownership of lands beneath the three-mile belt of the ocean, it would seem such interest would apply even more strongly to the bed of a lake in which the boundary between this country and a foreign nation is located. Yet, as above stated, the Court held that the ownership of the bed of this lake was so closely identified with sovereignty *of the State* that a presumption against their separation must be indulged.

In the case of *Illinois Central R. R. Co. v. Illinois,* 146 U. S. 387 (1892), involving the title to the soil beneath Lake Michigan within the boundaries of the State, this Court described fully the different legal results which flow from ownership of lands beneath navigable waters as compared with dry land. On this point the Court said (p. 452):

> "That the State holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the State holds title to soils under tide water, by the common law, * * * But it is a *title different in character* from that which the State holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to preemption and sale. It is a *title held in trust for the people* of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the *State may grant parcels of the submerged lands;* and, so long

as their disposition is made for such purpose, no valid objections can be made to the grants. *General language sometimes found in opinions of the courts, expressive of absolute ownership and control by the State of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases.* A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. *The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them,* so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, *than it can abdicate its police powers in the administration of government and the preservation of the peace."*[58]

An example of the application of this rule is found in *United States v. Chandler-Dunbar W. P. Co.*, 209 U. S. 447 (1908). The case involved the character of the State of Michigan's ownership of land beneath navigable waters

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[58]Plaintiff cites this case (Br. p. 151) in support of its argument that the State may convey title to lands beneath navigable waters "free of any public trust". Obviously the case does not support plaintiff's statement. Plaintiff ignores the fact that this case holds that grants by the State of submerged lands are valid only when they can be made without impairing the public trust. This was the holding in *Weber v. Board of Harbor Commissioners*, 18 Wall. 57, 66 (1873); *Boone v. Kingsbury*, 206 Cal. 148 (1928) and *City of Long Beach v. Marshall*, 11 Cal. (2d) 609, 614-615 (1938), also cited by plaintiff at this point.

in the bed of the St. Mary's River. Incidentally, the center of this river was the boundary between the United States and Canada. If the Federal Government could acquire a proprietary right in the bed of navigable waters by reason of the national interest, it would seem that the Court would have so declared in this case, in view of the existence of the international boundary line in the bed of the river. Nevertheless, the Court, through Mr. Justice Holmes not only upheld the State's title, but said (pp. 451-452):

> ". . . The right of the State to grant lands covered by tide waters or navigable lakes and the qualifications, as stated in Shively v. Bowlby, 152 U. S. 1, 47, are that the State may use or dispose of any portion of the same *'when that can be done without substantial impairment of the interest of the public in such waters, . . .'*"

The principle as expressed by Mr. Justice Holmes is invariably applied in the development of a harbor. Ships cannot land on a beach between high and low tide. Land must be filled and often leased or disposed of into private ownership for purposes of docks, wharves, warehouses and other uses incidental to navigation and fisheries. (See map of Los Angeles and Long Beach Harbors, p. 5.)

It would take too long to list all the cases of this Court which announce and rely upon this principle, but we respectfully submit that the statements of Mr. Chief Justice Taney in *Martin v. Waddell,* and of Mr. Justice Field in *Illinois Central v. Illinois,* and of Mr. Justice Holmes in *United States v. Chandler-Dunbar W. P. Co.,* and of Mr. Chief Justice Stone in *Massachusetts v. New*

York, and of many other of the justices of this Court, are not "patently unsound."[57]

This public trust doctrine is embedded in the constitutional and statutory law of the various States as well as in the common law. Congress has followed a consistent course ever since the enactment of the Ordinance of 1787 for the government of The Northwest Territory. This Ordinance required that:

> "all navigable waters within the said State shall forever remain public highways, free to the citizens of said State and of the United States, without any tax, duty, impost, or toll, therefor, imposed by the said State."

This language in the Ordinance of 1787 governed the States formed out of The Northwest Territory, namely, Illinois, Indiana, Ohio, etc. This language was then embodied in the Acts of Admission of other newly admitted States such as Alabama, Mississippi, Louisiana, Oregon, Florida, California, etc. Likewise, Congress required the Southern States, when they were readmitted into the Union after the Civil War, to embody this same phrase in their State Constitutions or statutes.[58]

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[57]This Court unanimously applied the public trust doctrine to navigable waters in California in *United States v. Mission Rock Co.,* 189 U. S. 391, 407 (1903), citing many cases.

[58]Examples of the doctrine in State Constitutions are found in the South Carolina 1868 Constitution, Article I, Section 40, 6 Thorpe, *American Charters, Constitution and Organic Laws* (1909), page 3284; California 1879 Constitution, Article XV. Statutory examples originate in the 1787 Northwest Territory Ordinance, 2 Thorpe, *supra,* page 961, carried into the Enabling Acts of every newly admitted State outside the Northwest Territory area. See *Pollard v. Hagan,* 3 How. 212 (1845). For example, the 1859 Act of Admission of Oregon, 5 Thorpe, *supra,* page 2996; Florida, 2 Thorpe, *supra,* page 663. (Appendix to Answer, pp. 67-78.)

This consistent policy of Congress demonstrates that the distinction between land under navigable water and dry upland is not predicated on a "legal fiction." Congress, itself, has not only recognized that such lands are subject to a public trust but has imposed mandatory conditions by which every new State must protect and preserve this trust.

Federal Grants in Territories Not Inconsistent With Public Trust Doctrine.

Plaintiff further argues that the rule that ownership of lands beneath navigable waters is an attribute of State sovereignty is fallacious because the United States may make grants of such lands within a territory, which would deprive the future State of the ownership thereof upon its admission to the Union. In support of this argument plaintiff cites *Shively v. Bowlby* and several other decisions (Br. p. 150). But the citations do not support plaintiff's argument. What the Court said on this subject in *Shively v. Bowlby* is as follows (152 U. S. 1, 48):

> "By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and state, over all the Territories, so long as they remain in a territorial condition. . . .
>
> "We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, *or to effect the improvement of such lands for the promotion and convenience of commerce with foreign*

nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory."

It will be seen that this holding is merely an application of the same principle laid down in the *Illinois* case and other cases above cited as to the enforcement of the governmental trust by the States. Since a State can dispose of its submerged lands in aid of the public trusts under which they are held, obviously the Federal Government, while exercising the entire sovereignty of a territory, both national and municipal, can administer the trusts in the same way and under the same limitations as a State can do. That is all the Court holds in this case. It does not hold that the Federal Government may destroy the public trust or withhold from the future State its lands beneath navigable waters. The other cases cited by plaintiff on this point simply reiterate what was said in *Shively v. Bowlby.*

THERE IS NO "BIZARRE DISTINCTION" AS TO NON-NAVIGABLE WATERS.

Plaintiff further argues that the doctrine that ownership of navigable waters is an incident to State sovereignty "has led to a bizarre distinction, whereby the lands under inland navigable waters are attributed to the States whereas the lands under non-navigable waters are attributed to the United States . . ." (Br. p. 149.) This statement indicates a misapprehension of the character and legal status of non-navigable waters. Lands beneath non-navigable waters are not attributed to the United States. They are simply part of the upland within which they are situated and belong to whoever happens to be the owner of such upland. Non-navigable water on privately

owned lands belongs to the private owners, on State owned lands belongs to the State, and on public lands of the United States belongs to the United States. Non-navigable water usually consists of shallow swamps, ponds, creeks, and, in the west, of intermittent streams which may be used for irrigation purposes by the riparian owners. They are not incidental to sovereignty at all. There are no public trusts and no public aspects of any kind connected with such waters. They are simply part of the land and may be drained or otherwise dealt with by the owner of the land itself. There is nothing bizarre about the fact that such waters belong to the owner of the land on which they are situated. It is merely the natural result of the fact that the public has no special interest in them.

Navigable waters, however, as we have shown, are subject to public trusts which must be enforced by the sovereign. The question here does not involve non-navigable waters at all, but, rather, to which sovereign, State or Federal, is the ownership of beds of navigable waters incidental?

Traditional Interests of States Focus Upon Ownership as Well as Police Powers.

Plaintiff asserts (Br. p. 149) that "the traditional interests of the State focus upon the exercise of police powers and other sovereign powers that do not depend upon the ownership of the area over which jurisdiction is exercised." This is exactly what was said by this Court with regard to the Federal Government in *United States v. Bevans, Manchester v. Massachusetts* and other cases, namely, that the exercise of the powers of sovereignty vested in the United States involve no

cession of territory and *do not depend upon the ownership of land.* Plaintiff's position would reverse the entire body of jurisprudence of the United States and of all the States on this subject. It is the States, not the Federal Government, whose powers over land beneath navigable waters depend on ownership. This is demonstrated by the fact that the States' right to take the fish belongs to it as the owner of the soil, as this Court held in *Smith v. Maryland, McCready v. Virginia, Manchester v. Massachusetts,* and numerous other cases.

If the State's traditional interests were limited to police powers, its rights to control the taking of fish from within its limits and to exclude residents of other States therefrom, as held by this Court in these decisions, could not exist.

It is of course true that the Federal Government has certain rights and duties in respect of navigable waters. But these, as we have shown, do not supersede the interests and rights of the people of the States under their own laws and for their own intrastate purposes. In other words, the States own the navigable waters and soils under them subject to the rights of their own citizens *and also* subject to the powers granted to the Federal Government. This point is very clearly expressed in the decision of this Court in the case of *Scott v. Lattig,* 227 U. S. 229, 242-243 (1913), as follows:

> ". . . Besides, it was settled long ago by this court, *upon a consideration of the relative rights and*

> *powers of the Federal and state governments under the Constitution,* that lands underlying *navigable waters within the several States* belong to the respective States in virtue of their sovereignty and may be used and disposed of as they may direct, *subject always to the rights of the public* in such waters *and* to the paramount power of Congress to control their navigation so far as may be necessary for the regulation of commerce among the States and with foreign nations, and that each new State, upon its admission to the Union, becomes endowed with the same rights and powers in this regard as the older ones. *County of St. Clair v. Lovingston,* 23 Wall. 46, 68; *Barney v. Keokuk,* 94 U. S. 324, 338; *Illinois Central Railroad Co. v. Illinois,* 146 U. S. 387, 434-437; *Shively v. Bowlby,* 152 U. S. 1, 48-50, 58; *McGilvra v. Ross,* 215 U. S. 70."

We submit, therefore, that whether we call ownership an attribute of sovereignty or not is immaterial. The basic point is that there are special governmental functions and duties which pertain to the ownership by a State of lands beneath navigable waters which are different from those pertaining to the ownership of vacant uplands. That is why the ownership of lands beneath navigable waters by the Crown and by the original States was and is deemed to be an incident necessary to sovereignty. Neither this ownership nor the rights incident thereto were ever granted by the original States to the Federal Government.

G. New States Have the Same Rights of Ownership of Lands Beneath Navigable Waters as the Original States.

Having established sovereignty, jurisdiction and ownership in the original States over all navigable waters within their boundaries, we now pass to a consideration of the ownership by the new States of lands beneath their navigable waters.

1. The United States Holds Title to Beds of All Navigable Waters Within Territories in Trust for the Future State.

It has been the uniform holding of this Court since the decision in *Pollard v. Hagan,* 3 How. 212 (1845), that title to the soils under navigable waters in territories is held by the United States only in trust for the future State. This principle has been applied to all new States having navigable waters within their boundaries, whether created out of territory ceded to the Federal Government by the original States or out of territory acquired by purchase or by conquest. This principle has already been applied to Alaska by statute enacted by the United States Congress.[59]

There are at least seven decisions of this Court which unequivocally hold that lands beneath tidewaters acquired from Mexico in 1848 within the area which was to become the State of California were held by the United

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[59]See *infra,* pp. 154-155.

States only in trust for the future States. A few of these cases are:

Weber v. Board of Harbor Commissioners, 85 U. S. 57, 65 (1873):

"Although title to the soil under the tide waters of the Bay was acquired by the United States by cession from Mexico, equally with the title to the upland, they held it only in trust for the future State. Upon the admission of California into the Union upon an equal footing with the original States, absolute property in and dominion and sovereignty *over all soils under the tide waters within her limits passed* to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, . . . Pollard's Lessee v. Hagan, 3 How. 212."

San Francisco v. LeRoy, 138 U. S. 656, 670 (1890):

"As to tide-lands, although it may be stated as a general principle—and it was so held in *Weber v. Board of Harbor Commissioners,* 18 Wall. 57, 65,—that the titles acquired by the United States to lands in California under tide-waters, from Mexico, were held in trust for the future State, so that their ownership and right of disposition passed to it upon its admission into the Union, . . ."

Knight v. United States Land Association, 142 U. S. 161, 183 (1891):

"It is the settled rule of law in this court that absolute property in, and dominion and sovereignty

over, the soils under the tide waters in the original States were reserved to the several States, and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States possess *within their respective borders. Martin v. Waddell,* 16 Pet. 367, 410; *Pollard v. Hagan,* 3 How. 212, 229; *Goodtitle v. Kibbe,* 9 How. 471, 478; *Mumford v. Wardwell,* 6 Wall. 423, 436; *Weber v. Harbor Commissioners,* 18 Wall. 57, 65. Upon the acquisition of the territory from Mexico the United States acquired the title to tide lands equally with the title to upland; but with respect to the former they held it only trust for the future States that might be erected out of such territory."

Other decisions in which this Court applied the same rule to submerged lands *in California* are:

Mumford v. Wardwell, 6 Wall. 423, 436 (1867); *United States v. Mission Rock Co.,* 189 U. S. 391, 404 (1903); *United States v. Coronado Beach Co.,* 255 U. S. 472, 487-488 (1921); *Borax Consolidated v. Los Angeles,* 296 U. S. 10, 15 (1935).

2. Rule of Equality.

The constitutional principle is that the new State must be admitted to the Union on an equal footing with the original States. Equality among States under the Constitution requires that the new State shall have all attributes inherent in her character as a sovereign State. This right of equality is not dependent upon any Act of Congress as counsel for plaintiff indicate (Brief pp. 8, 61-66). It is inherent in the Constitution and guaranteed by the very nature of the Federal compact. It is described

Mumford v. Wardwell (1867), 6 Wall. 423; *Weber v. Harbor Commissioners,* (1874), 18 Wall. 57; *Packer v. Bird* (1891), 137 U. S. 661, 666; *San Francisco v. Le Roy* (1891), 138 U. S. 656, 671; *Knight v. United States Land Association* (1891), 142 U. S. 161."

"Lands under navigable water are not 'public lands'." 45 C. J. 535, 557.

The Department of the Interior has ruled in several cases and issued official opinions that submerged lands off the coast of California, as well as in other coastal areas, are not "public lands of the United States" and hence that the Department has no jurisdiction to grant applications for Federal oil and gas leases under the Act of February 25, 1920, as amended. For example, on September 18, 1934, the Commissioner of the General Land Office rejected six applications, each describing a separate parcel of 256 acres of submerged lands lying in the Pacific Ocean and Santa Barbara Channel, the Commissioner's written opinion stating, in part, that:

"The words 'Public Lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws (Newhall v. Sanger, 192 U. S. 761, 763). In order therefore that deposits of oil or gas be subject to appropriation under the oil and gas leasing act, the lands containing such deposits must be, or have been, public lands, subject to appropriation under the general land laws respecting the disposal of the public domain. In Mann v. Tacoma Land Co. (153 U. S. 273-284) the Court said: 'It is settled that the general legisla-

by this Court as "the constitutional principle of the equality of states."[60]

In *Withers v. Buckley*, 20 How. 84, 93 (1857), this Court said regarding the State of Mississippi that:

> ". . . Clearly, Congress could exact of the new State the surrender of no attribute inherent in her character as a sovereign independent State, or indispensable to her equality with her sister States, necessarily implied and guaranteed by the very nature of the Federal Compact."

Escanaba & Lake Michigan Transportation Company v. City of Chicago, 107 U. S. 678, 690 (1882), where, in dealing with Illinois, the Court stated that:

> "On her admission, she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States. She was admitted and could be admitted only on the same footing with them. The language of the Act of admission is 'on an equal footing with the original States *in all respects whatever.*' 3 Stat. at L., 536. *Equality of constitutional right* and power is the condition of all the States of the Union, old and new. Illinois, therefore, as was well observed by counsel, could afterwards exercise the same power over rivers within her limits that Delaware exercised over Blackbird Creek, and Pennsylvania over the Schuylkill River. *Pollard v. Hagan*, 3 How. 212; *Permoli v. First Municipality*, 3 How., 589; *Strader v. Graham*, 10 How. 82."[61]

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[60]*United States v. Utah*, 283 U. S. 64, 75 (1931).

[61]To the same effect: *St. Anthony Falls Water Power Co. v. St. Paul Water Commrs.*, 168 U. S. 349 (1897); *Ward v. Race Horse*, 163 U. S. 504 (1896); *Pollard v. Hagan*, 3 How. 212 (1845); *Coyle v. Oklahoma*, 221 U. S. 559 (1911).

> tion of Congress in respect to public lands does not extend to tidal lands.'
>
> "Congress has never assumed to enact legislation for the disposal of lands under tidal waters. It was said in Barney v. Keokuk (94 U. S. 324, 338): 'The United States has wisely abstained from extending (if it could extend) its surveys and grounds beyond the limits of high water.' To the same effect, see also Baer v. Moran Brothers Co. (153 U. S. 287).
>
> "From the foregoing, it is clear that the lands for which the applications were filed are not subject to appropriations under section 13 of the act of February 25, 1920. Accordingly, the applications are rejected. . . ."[69]

On an appeal taken by the same applicants to the Secretary of the Interior, the ruling of the Commissioner was affirmed in the opinion of the Secretary, dated February 7, 1935, stating that:

> "By decision of September 18, 1934, the commissioner of the General Land Office rejects the applications on the ground that the general leasing act of February 25, 1920 (41 Stat. 437), did not extend to lands under tidal waters, citing the cases of *Barney v. Keokuk* (94 U. S. 324); *Mann v. Tacoma Land Co.* (153 U. S. 273); and *Baer v. Moran Brothers Co.* (153 U. S. 287).[70]

It is significant that counsel for plaintiff in one part of their Brief at least concede the rule as announced by

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[69]Appendix to Answer, pages 469-470.

[70]Appendix to Answer, pages 470-471.

3. Under the Rule of Equality, Title to Beds of Navigable Waters Vests in New State Upon Admission into the Union.

One of the incidents of equality among States is that the title to all lands beneath navigable waters within the boundary of the new State vests in the State upon its admission into the Union. The reason is that, as shown above, the title to lands beneath navigable waters is held by the State as an incident of sovereignty, *i. e.*, to preserve and administer the public trust for commerce, navigation and fishery. A new State is placed on constitutional equality with the original States in all matters which pertain to State sovereignty. (Pltf. Br. pp. 7-8.)

In at least nine decisions, this Court has distinctly held that California has the same

"rights, sovereignty and jurisdiction"

as the original States with respect to all territory within its boundaries, and every one of these nine decisions has dealt with navigable waters and the lands under such waters within the State. In *Cardwell v. American Bridge Co.*, 113 U. S. 205, 212 (1885), this Court made the following clear statement of the rule.

> ". . . The act admitting California declares that she is 'admitted into the Union on an equal footing with the original States *in all respects whatever.*' She was not, therefore, shorn by the clause as to navigable waters within her limits of any of the powers which the original States possessed over such waters within their limits."

In the year 1867 this Honorable Court in *Mumford v. Wardwell*, 6 Wall. 423, 436, determined that:

> "California was admitted into the Union September 9, 1850, and the Act of Congress admitting her de-

clares she is so admitted on an equal footing, in all respects, with the original States. (9 Stat. at L. 452.) Settled rule of law in this court is that the shores of *navigable waters* and the soils under the same in the original States were not granted by the Constitution, to the United States, but were reserved to the several States."

In the year 1903, this Honorable Court, in *United States v. Mission Rock Company,* 189 U. S. 391, 404, determined that:

"The title and dominion which a State acquires to lands under tidewaters by virtue of her sovereignty received elaborate consideration, exposition and illustration in the case of *Shively v. Bowlby,* 152 U. S. 1, 58. Prior cases are there collected and quoted, among others, *Weber v. Commissioners,* 18 Wall. 57, 65. From the latter as follows (and the case concerned tide lands in California): 'Although the title to the soil under the tidewaters of the bay was acquired by the United States by cession from Mexico, equally with the title to the upland, they held it only in trust for the future State. Upon the admission of California into the Union upon equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under the tidewaters *within her limits* passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper . . . .'"[62]

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[62]Six other decisions declaring this principle applicable to California are: *Weber v. Board of Harbor Commissioners,* 85 U. S. 57, 65 (1873); *San Francisco v. LeRoy,* 138 U. S. 656, 670 (1890); *Knight v. U. S. Land Ass'n.,* 142 U. S. 161, 183 (1891); *United States v. Coronado Beach Co.,* 255 U. S. 472, 487-488 (1921); *Borax Consolidated, Ltd. v. Los Angeles,* 296 U. S. 10, 15 (1935); *United States v. O'Donnell,* 303 U. S. 501, 519 (1938).

4. Act of Admission of California Into the Union.

"AN ACT FOR THE ADMISSION OF THE STATE OF CALIFORNIA INTO THE UNION.

"Whereas the people of California have presented a Constitution and asked admission to the Union, *which constitution was submitted to Congress* by the President of the United States by message, dated February thirteen, eighteen hundred and fifty, and which, on due examination, is found to be republican in its form of government:

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the State of California shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union *on an equal footing with the original States, in all respects whatever* . . .

"Section 3. AND BE IT FURTHER ENACTED, That the said State of California is admitted into the Union upon the express condition that the people of said State, through their legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law and do no act whereby the title of the United States to, and right to dispose of, the same shall be impaired or questioned; . . ."[63]

In view of the arguments of counsel for plaintiff with regard to the two phrases in the Act of Admission of California, namely the "equal footing" clause and the "primary disposal of the public lands" clause, we shall review the background and the firmly established meaning of those phrases as announced by the decisions of this Court.

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[63]Appendix to Answer, page 17.

5. Pollard's Lessee v. Hagan, 3 How. 212 (1845).

The clause requiring that new States must be admitted on an equal footing with the original States and the clause relating to "primary disposal of the public lands" both had their origin in the Ordinance of 1787 for the government of The Northwest Territory. As to the public lands, that Ordinance provided:

> ". . . The legislatures of those districts, or new states, *shall never interfere with the primary disposal of the soil by the United States* in Congress assembled, nor with any regulations Congress may find necessary, for securing the title in such soil, to the bona-fide purchasers[64] . . ."

When Alabama was admitted to the Union in 1819, the provision that it was admitted upon "an equal footing" with the original States was of course included in the Act of Admission. The clause relating to the public lands was included in the Enabling Act (March 2, 1819) and read as follows:

> ". . . that they [the People of Alabama] forever disclaim any right and title to the waste or unappropriated lands lying within the said Territory; and that the same shall be and remain at the sole and entire disposition of the United States; . . ."[65]

The *Pollard* case involved a parcel of land below the high-water mark of the waters of Mobile Bay. (Whether this was a bay in the sense now claimed by plaintiff is not known.) Plaintiff claimed under a patent from the Federal Government issued after admission of Alabama to the Union.

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[64]Donaldson, *The Public Domain* (1880 ed.), p. 155.

[65]1 Thorpe, *American Charters, Constitutions and Organic Laws* (1909), p. 94.

The court was wholly conscious of the importance and far-reaching effects of the decision it was called upon to make. On this point it was said (p. 220):

> ". . . And we now enter into its examination with a just sense of its great importance to all the states of the union, and particularly to the new ones."

The opinion of Mr. Justice Catron, who was the only dissenter, expressed the importance of the case even more strongly. He said (p. 235):

> ". . . this is deemed the most important controversy ever brought before this court, either as it respects the amount of property involved, or the principles on which the present judgment proceeds— . . ."

It is important to note that plaintiff in the *Pollard* case (p. 221) urged, as does plaintiff here, that by the Act of Admission *"the land under the navigable waters, and the public domain above high water, were alike reserved to the United States, . . ."* In other words, the plaintiff there claimed, as does plaintiff here, that there was no distinction between the land under navigable waters and the dry upland which belonged to the Federal Government. The Court rejected this argument upon the ground that in order to be upon an equal footing with the original States Alabama must have the same rights of sovereignty and ownership in lands beneath navigable waters as the original States. On this point the Court said (pp. 228-9):

> "Alabama is, therefore, entitled to the *sovereignty and jurisdiction* over all the *territory within her lim-*

> *its, subject to the common law,* to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted into the union on an equal footing with the original states, the constitution, laws, and compact, to the contrary notwithstanding."

Chief Justice Taney, who wrote the decision in *Martin v. Waddell,* was still a member of the Court and joined in the decision in *Pollard v. Hagan.*[66] His view is obviously reflected in the following excerpt from the Court's opinion (pp. 229-230):

> ". . . In the case of Martin and others v. Waddell, 16 Peters, 410, *the present chief justice,* in delivering the opinion of the court, said: 'When the Revolution took place, the people of each state became themselves sovereign; and in *that character* hold the absolute right to all *their navigable waters, and the soils under them* for their own common use, subject only to the rights surrendered by the Constitution.' Then to Alabama belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States: . . .
>
> * * * * * * * *

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[66]Five years later Chief Justice Taney, speaking for this Court, stated that the Court could "see no reason for doubting" the correctness of the decision in *Pollard v. Hagan,* although the Court was urged to overrule that case. *Goodtitle v. Kibbe,* 9 How. 470 (1850).

> "By the preceding course of reasoning we have arrived at these *general conclusions*: First, The shores of *navigable waters*, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the *states* respectively. Secondly, The new states have the same rights, sovereignty, and jurisdiction over this subject as the original states. Thirdly, The right of the United States to the *public lands*, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case."

The above demonstrates that the Court held the ownership of lands beneath navigable waters to be so closely identified with state sovereignty as to remove them entirely from the category of public lands reserved to the Federal Government in the Act of Admission.

The case of *Pollard's Lessee v. Hagan* has been cited and followed with approval by this Court consistently for one hundred years. It is cited with approval by the Court in 52 subsequent cases, and the principles announced therein have become a rule of property upon which thousands of titles have vested.[67]

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[67] See *Sheppard's Citations* which also show that *Pollard v. Hagan* has been cited with approval by all Federal and State Courts in 244 cases.

6. Lands Beneath Navigable Waters Are Not "Public Lands" of the United States.

The principle that public lands of the United States do not include lands under navigable waters is now thoroughly settled in our jurisprudence. The following authorities are but a few of many that could be cited:

In *Mann v. Tacoma Land Company,* 153 U. S. 273, 284 (1894), Mr. Justice Brewer for a unanimous court, in considering an Act of Congress authorizing issuance of scrip for "unoccupied and unappropriated public lands of the United States," said that:

> "It is settled that the general legislation of Congress in respect to public lands does not extend to tide lands. . . . but the term 'public lands' does not include tide lands. As said in Newhall v. Sanger, 92 U. S. 761, 763: 'The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.'"

In *Borax Consolidated v. Los Angeles,* 296 U. S. 10, 17 (1935), Chief Justice Hughes said, for a unanimous court, that:

> "So far as pertinent here, the jurisdiction of the Land Department extended only to 'the public lands of the United States.' The patent to Banning was issued under the preemption laws, which expressly related to lands 'belonging to the United States.' R. S. 2257, 2259. Obviously these laws had no application to lands which belonged to the States. Specifically, the term 'public lands' did not include tidelands. *Mann v. Tacoma Land Co.,* 153 U. S. 273, 284. 'The words "public lands" are habitually used in our legislation to describe such as are subject to

sale or other disposal under general laws.' *Newhall v. Sanger,* 92 U. S. 761, 763; *Barker v. Harvey,* 181 U. S. 481, 490; *Union Pacific R. Co. v. Harris,* 215 U. S. 386, 388."

2 *Lindley on Mines* (3rd Edition 1914), pages 1015-1016, states that:

"There is no principle involved in the consideration of the public land system better settled or more clearly enunciated than that lands under tidal waters, and below the line of ordinary high tide, are not 'public lands.' When a state bordering upon these waters is admitted into the Union it becomes, by virtue of its sovereignty, *the owner of all lands extending seaward so far as its municipal dominion extends,*— . . . from the line of ordinary high tide on the shore of the open ocean seaward to the distance of three miles, or a marine league."

In *Barney v. Keokuk,* 94 U. S. 324, 338 (1876), Mr. Justice Bradley stated that:

". . . the United States has wisely abstained from extending (if it could extend) its surveys and grants beyond the limits of high water."[68]

A good statement of the meaning of the phrase "primary disposal of the public lands," as found in many Acts of Congress admitting new States into the Union,

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[68]To the same effect: *Shively v. Bowlby* (1893), 152 U. S. 1, 49-50; *Inland Finance Co. v. Standard Salmon Packers* (Alaska 1928), 7 Alaska 131; 50 C. J., p. 886; 42 Am. Jur., p. 794; Patton, *Titles,* p. 577; *Re Logan* (1900), 29 L. D. 395; *Northern Pac. Rwy. Co. v. Hirzel* (1916, Ida.), 161 Pac. 854, 859.

is contained in *Broward v. Mabry,* 50 So. 826, 830 (Fla. 1909), where the court states that:

> "The provision in Act Cong. March 3, 1845, c. 48, 5 Stat. 742, admitting Florida into the Union 'on the express condition that (the state) shall never interfere with the *primary disposal of the* public lands lying within' the state, *has reference to lands* within the territorial limits of the state, *the title to which was in the United States for its own purposes, as distinguished from lands held in trust for the people, such as lands under navigable waters,* which passed to the state in its sovereign capacity to be held by it in trust for the people thereof, for the public purposes authorized by law subject to the power of Congress under the federal Constitution. Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331; City of Chicago v. Illinois Cent. R. Co., 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018; State v. Black River Phosphate Co., 32 Fla. 82, 13 South. 640, 21 L. R. A. 189, and notes."

In the decision in *Shivley v. Bowlby,* 152 U. S. 1, it was specifically stated that the principle that the reservation of public lands does not include the beds of navigable waters, as laid down in *Pollard v. Hagan,* applies to California. On this point the Court said (p. 28):

> "That these decisions [*Pollard v. Hagan,* and others] do not, as contended by the learned counsel for the plaintiff in error, rest solely upon the terms of the deed of cession from the State of Georgia to the United States, clearly appears from the constant recognition of the same doctrine as applicable to California, which was acquired from Mexico by the Treaty of Guadalupe Hidalgo of 1848. 9 Stat. 926; *United States v. Pacheco* (1864), 2 Wall. 587;

this Court that the phrase "public lands" has been held not to include submerged lands lying in the Pacific Ocean, where plaintiff states that (Br. pp. 194-195):

> "An important fact to be noted in respect to these decisions [by the Secretary and Department of the Interior rejecting applications for oil and gas leases covering submerged lands in the Pacific Ocean] is that in each instance the application being considered was filed under the provisions of the Mineral Leasing Act (41 Stat. 437; 30 U. S. C. sec. 181 ff.), which applies to 'public lands.' However, since the term 'public lands' has been held not to extend to land situated below high water mark (*Barney v. Keokuk*, 94 U. S. 324, 338; *Mann v. Tacoma Land Company*, 153 U. S. 273, 284, discussed *supra*, pp. 62, 70), there was room for the conclusion that the Department of Interior had no *jurisdiction*[71] over the lands covered by the several applications under the provisions of the Act."

In another place in its brief (p. 62) plaintiff appears to take a contrary position as to the effect of these cases. Plaintiff states that there is doubt whether these decisions should be extended to the three-mile belt. Of course, if these decisions did not hold that the three-mile belt was not public land, they could have furnished no ground for the Secretary's opinion above quoted, since the land there in question was below low-water mark in the three-mile belt.

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[71]Emphasis added in Plaintiff's Brief, page 195.

7. Congress Intended That the Act Admitting California Should Reserve Only "Public Lands" as That Term Had Been Construed by This Court.

The Congressional debates upon the admission of California show that Congress was thoroughly familiar with the interpretation placed by this Court in *Pollard v. Hagan* (decided only five years earlier) upon the reservation of "the primary disposal of public lands." This clause in the Act admitting California was debated in the Senate and Senators Webster of Massachusetts and Soule of Louisiana discussed at some length the effect of the decision of *Pollard v. Hagan*. Referring to this case, Senator Soule said:[72]

> ". . . The point in dispute was, whether or not the ownership of an alluvial increment of soil, found in front of private property in the Bay of Mobile, belonged to the riparian owner; and his right to the alluvial was pressed upon the ground that the United States, under whom the riparian owner held, having originally acquired that property from Spain, had acquired it with all the rights inhering to the same by the laws of that country, and as such it had been transferred to him by them. . . . The Court decided that the ownership of the alluvial soil was in the *State of Alabama,*[73] who could clearly set up no right or claim to it, ***except under her sovereignty;*** and so far, therefore, the opinion goes in support of my argument. And there are in it, it is true, several *obiter dicta,* tending to establish that the United States may possess lands within the borders of a state,

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[72]Appendix to Congressional Globe, 31st Congress, 1st Session, June 28, 1850, p. 1001; see also p. 960, *et seq.*, June 24, 1850. This debate is mentioned in *Van Brocklin v. Tennessee,* 117 U. S. 151.

[73]Italics contained in Congressional Globe.

> without interfering at all with her sovereignty; but of which lands does the opinion speak? . . . Of lands possessed of them by specific deeds of cession from the state, and *not of lands held under the right and by virtue of the sovereignty.*"

It is clear from the above that the Senators understood that lands beneath navigable waters vested in the new State "by virtue of sovereignty" and that the reservation of "public lands" to the United States did not impair State sovereignty.

The Act admitting California to the Union constituted a compact between California and the United States.[74] Embodied in this compact was the construction which had been placed by this Court in *Pollard v. Hagan* upon the reservation to the Federal Government of public lands in Alabama. Under the terms of this compact "public lands" did not include lands beneath navigable waters within the State. That being so, a unilateral alteration of this contract by the United States is not now legally possible.

Entirely apart from the principles of the *Pollard* case, it would seem obvious on its face that the reference in the Act of Admission to the "primary disposal of the public lands" does not refer to lands below low-water mark in the open sea out to the three-mile limit, which are not commonly subject to sale or disposal under public land laws.

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[74]It was so held as to Alabama in *Pollard v. Hagan*, 3 How. 230.

Plaintiff endeavors to construe the Act of Admission as meaning that the lands beneath the marginal sea, even though not constituting "public lands," were, nevertheless, reserved to the United States because there was no express grant of such lands. In support of this contention plaintiff says (Br. p. 63):

> "In any event, assuming that the Act [admitting California] did not affirmatively reserve the title of the United States here involved, it is none the less evident that it did not grant it."

It is respectfully submitted that this statement is at variance with the most elementary rules of statutory construction. The Act contains a specific reservation as to the primary disposal of and title to the public lands. Counsel say that if this reservation did not include lands beneath the marginal sea, nevertheless, plaintiff must have withheld such lands from the State because plaintiff did not expressly grant them. This would mean that there are, in effect, two separate and distinct reservations in the Act, one written, the other unwritten. The written reservation reserved the public lands, and the unwritten one reserved the lands beneath the marginal sea. No such construction is tenable. The carefully worded and much debated reservation of the public lands must have included everything which Congress intended to reserve. *Expressio unius est exclusio alterius.* Unless the lands beneath the marginal sea are in the category of "public lands," they were not reserved and plaintiff's case must fail.

This construction is borne out by another clause in the Act of Admission, which reads:

> ". . . that all the *navigable waters within the said State* shall be common highways, and forever free, as well to the inhabitants of said State as to the citizens of the United States, without any tax, impost, or duty therefor; . . ."[75]

Thus we have in the same Act an express reservation of "public lands" and a restriction upon the use of "all the navigable waers" within the State. This demonstrates that Congress had both subjects in mind and intended to deal with them in different ways, namely, to reserve title absolutely to the public lands but merely to provide, as to the navigable waters, that they should remain common highways. In view of the express reservation of the public lands, this different treatment of the subject of navigable waters demonstrates that Congress did not intend to reserve any title in the latter.

Congress knew that the Constitution of California extended the boundary three miles into the sea and that the three-mile belt was part of the navigable waters of the State, for the Constitution was approved in this very Act. It is impossible to believe that if Congress had intended to reserve the beds of all navigable waters it would not have so specified when it was dealing with the very subject. Again, the rule of *expressio unius* applies. The provision for the maintenance of all navigable waters as

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[75]A similar clause also is found in the Ordinance of 1787 and in Acts admitting other new States.

common highways must be deemed to be the only limitation regarding navigable waters that was intended.

Plaintiff refers (Br. p. 63) to the report of the committee of the Senate which reported on the Act for the Admission of California. This report, in referring to the amendment regarding public lands, speaks of the right of the United States "to the public domain *and other public property* in California."[76] Plaintiff makes the argument that the phrase "other public property" must include the bed of the marginal sea. Of course, the argument proves entirely too much, for if this were true, it would also have included the lands beneath bays, harbors, "inland waters" and between high and low tide. "Public domain and other public property" had no reference to lands beneath navigable waters which vested in the State by virtue of its sovereignty. "Other public property" obviously referred to the lands and fortifications then owned by the United States at the military reservations at San Francisco, Monterey and San Diego, and similar properties.

8. California Owns All Land Beneath Navigable Waters Within Its Jurisdiction (Except Lands Previously Granted).

We have heretofore shown (*supra*, p. 46) that it is possible for the Federal Government to acquire land *within a State* in only four ways: (1) by cession by the State, (2) by purchase with the consent of the State, (3) by purchase or condemnation from private owners, and (4)

[76]Italics in Plaintiff's Brief.

in the case of new States, by reservation in the Act of Admission of land not incident to State sovereignty.

We showed, also, that lands beneath navigable waters out to the three-mile limit in the original States were never acquired by the Federal Government in any of these four ways. Under the principle that the State is the original and ultimate owner of all lands within its jurisdiction (not previously granted), the original States were and are the owners of all the lands beneath their navigable waters. The decision of *Pollard v. Hagan* and the many cases which follow and apply its principles and the long settled rule that public lands do not include navigable waters establish beyond doubt that the Federal Government did not retain lands beneath navigable waters in California. The territorial jurisdiction of California extends over the entire three-mile belt.[77] Plaintiff specifically admits this to be so. (Br. p. 151.)

Hence, under the basic principles above set forth, it must follow that these lands belong absolutely to the State of California, subject only to the powers vested in the Federal Government by the Constitution.

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[77]California Government Code, §125, formerly Political Code, §33, provides:

> "The sovereignty and jurisdiction of this state extends to all places within its boundaries as established by the Constitution, . . ."

H. Decisions and Authorities Upholding State Ownership of Bed of Sea Out to the Three-Mile Limit.

Plaintiff relies heavily upon the assumption (Br. p. 154) that there are no decisions in which this Court has definitely determined the question of the ownership of the bed of the sea within a State's territorial limits.

We have already discussed this question under subdivision E (*supra*, pp. 47-65), where we showed that the courts have definitely held that ownership by the original States of the beds of their navigable waters is co-extensive with their respective jurisdictions. We showed that the Court applied this principle as well to the open sea (*Dunham v. Lamphere*, approved in *Manchester v. Massachusetts*) as to bays and harbors. It is by no means correct to say that the Court has not definitely dealt with the subject of the State's ownership of the bed of the sea. A few other decisions dealing with the "open sea" are:

United States Supreme Court.

(a) The Abby Dodge v. United States, 223 U. S. 166 (1912).

The principle that the ownership by the State of the lands beneath navigable waters is co-extensive with its jurisdiction over such lands is graphically shown in *The Abby Dodge.*

The case is also important because the United States was a party to and, in fact, instituted the action.[78]

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[78]The docket title of the case is "The vessel 'Abby Dodge,' A. Kalimeris, Claimant, Appellant, v. The United States."

The main issue was the constitutionality of an Act of Congress adopted June 20, 1906, prohibiting the landing or sale of sponges taken by means of diving apparatus

> "from the waters of the Gulf of Mexico or Straits of Florida."

The Act did not specify whether its operation was limited to the territorial waters of the State or extended to the bed of the ocean outside the jurisdiction of the State. Appellant urged that the Act was unconstitutional, whichever way construed; *i. e.*, that Congress had no authority to legislate on this subject either within or without the territorial limits of the State.

The Court considered the Act from both aspects. Taking up first the claim that the Act applied *within the State*, the Court said (p. 173) that if this construction were to be accepted

> "the repugnancy of the act to the Constitution would plainly be established by the decisions of this court."

Here we have an unequivocal holding that an Act of Congress regulating the taking of sponges from the bed of the sea within the territorial waters of a State would be unconstitutional. And the reason for such unconstitutionality is given in the following passage, which the Court quoted from *McCready v. Virginia:*

> "'The principle has long been settled in this court, that each State owns the beds of all tide-waters *within its jurisdiction*, unless they have been granted away. *Pollard's Lessee v. Hagan*, 3 How. 212; *Smith v. Maryland*, 18 How. 74; *Mumford v. Wardwell*, 6 Wall. 486; *Weber v. Harbor Commissioners*, 18 *id.* 66. In like manner, the States own the tidewaters themselves, and the fish in them, so far as they are

capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. *Martin v. Waddell*, 16 Pet. 410. . . .

"'The right which the people of the State thus acquire comes not from their citizenship alone, but *from their citizenship and property combined.* It is, in fact, *a property right*, and not a mere privilege or immunity of citizenship.'" (p. 177.)

This holding cannot be considered as dictum because it was one of the questions involved and necessary to be decided in that case. This appears from the following (p. 175):

"The obvious correctness of the deduction which the proposition embodies that the statute is repugnant to the Constitution when applied to sponges taken or gathered within state territorial limits, however, establishes the want of merit in the contention as a whole. In other words, the premise that the statute is to be construed as applying to sponges taken within the territorial jurisdiction of a State is demonstrated to be unfounded by the *deduction of unconstitutionality to which such premise inevitably and plainly leads.* This follows because of the elementary rule of construction that where two interpretations of a statute are in reason admissible, one of which creates a repugnancy to the Constitution and the other avoids such repugnancy, the one which makes the statute harmonize with the Constitution must be adopted."

The Court then held the statute valid as an exertion of congressional power to regulate foreign commerce if the

Abby Dodge was gathering sponges *outside of State boundaries* and *only* in

> "waters which by the law of nations would be regarded as the common property of all and was transporting the sponges so gathered to the United States, the vessel was engaged in foreign commerce, and was therefore amenable to the regulating power of Congress over that subject."

The court held that although the statute *so construed* was valid, the "averments of the libel" were indefinite and failed to "*negative the fact that the sponges may have been taken from waters within the territorial limits of a State.*" Therefore, the court said that

> "the libel failed to charge an element essential to be alleged and proved, in order to establish a violation of the statute."

This holding is squarely in accord with the rulings of *United States v. Bevans, Manchester v. Massachusetts, Pollard v. Hagan,* and other cases previously discussed. The Federal Government was held *not* to have jurisdiction to regulate the taking of sponges from the bed of the sea within the territorial limits of Florida *because* the bed of the sea *belongs* to Florida. Conversely, if the United States had owned the soil within three miles of the coast it could have prevented the taking of sponges from its own property.[79]

It is also significant that the Court cited *Pollard v. Hagan, McCready v. Virginia* and *Martin v. Waddell.* These cases, plaintiff asserts, involved only "inland

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[79] *Camfield v. United States,* 167 U. S. 518 (1897); *United States v. Beebe,* 127 U. S. 338 (1888).

waters." But here they are cited as furnishing the basis of the ruling that the State owns the beds of *all* waters within its territorial jurisdiction. This demonstrates that the governing principle does not rest on any supposed distinction between "inland waters" and the three-mile belt, but rather on the question whether the area in dispute is beneath navigable waters within the legally established boundaries of the State.

Finally, and perhaps the most significant thing about the *Abby Dodge* case is that Congress in 1914 recognized and gave effect to the Court's decision by amending the statute so as to make it effective only in waters

"outside of State territorial limits."

We have, therefore, a statutory recognition *by the United States itself,* acting in its sovereign capacity through Congress, that the Federal Government cannot exercise the proprietary right of an owner of the soil in the territorial waters of a State.

(b) NEW JERSEY v. DELAWARE, 291 U. S. 361 (1934). DECREE 295 U. S. 694 (1935).

This case involved the settlement of the boundary line between Delaware and New Jersey. The opinion by Mr. Justice Cardozo contains important statements concerning the ownership by the Crown of England of the beds of navigable waters and the like ownership by our States, and also concerning the sovereign capacity in which such ownership is held. On these points Justice Cardozo said:

> ". . . There is high authority for the view that power was in the Crown by virtue of the *jus privatum* to convey the soil beneath the waters for uses merely private, but subject always to the *jus publicum,* the right to navigate and fish. *Commonwealth v.*

Alger, 7 Cush. 53; *People v. N. Y. & S. I. Ferry Co.*, 68 N. Y. 71, 76; *People v. Steeplechase Park Co.*, 218 N. Y. 459, 473; 113 N. E. 521; *Shively v. Bowlby*, 152 U. S. 1, 13; Hale De Jure Maris, p. 22. Never has it been doubted that the grant will be upheld where the soil has been conveyed as an incident to the grant or delegation of powers strictly governmental. *Martin v. Waddell's Lessee*, 16 Pet. 367, 410, 413; *Massachusetts v. New York*, 271 U. S. 65, 89, 90. In such circumstances, 'the land under the navigable waters passed to the grantee as one of the royalties incident to the powers of government; and were to be held by him in the same manner, and for the same purposes that the navigable waters of England, and the soils under them, are held by the Crown.' *Martin v. Waddell's Lessee, supra*, p. 413." (291 U. S. 373-374.)

It is important to note that here Justice Cardozo does not talk about "inland waters" but about "navigable waters" and the soils under them.

The above holding must be considered in relation to the final decree of the Court.

The decree in this case (295 U. S. 694) contains a description of the boundary lines as fixed by this Court between the two States. A map is attached to and made part of the decree and is contained in 295 U. S. opposite page 701. The boundary line, as described in the decree and shown on the map, *extends three miles into the Atlantic Ocean*. The description in the decree of that portion of the line which extends into the Atlantic is as follows (p. 698):

> "Thence (13) in a straight line S 24° 06′ E True, be the distance more or less, *through Delaware Bay and seaward to the limits of the respective States of*

New Jersey and Delaware in the Atlantic Ocean, said course passing through a point located S 65° 54′ W True, 1303 yards from Brandywine Shoal Light."

It is clear from the above, together with the map, that the limits of the respective States are three miles oceanward of a line drawn between the headlands of Delaware Bay, namely from Cape Henlopen to Cape May. It is also important to note that this Court adjudicated *ownership* by each State over the territory thus declared to be within its jurisdiction. On this point the Court decreed (pp. 698-699):

> "The State of Delaware, its officers, agents and representatives, its citizens and all other persons, are perpetually enjoined from disputing the *sovereignty, jurisdiction and dominion of the State of New Jersey over the territory adjudged to the State of New Jersey by this decree;* and the State of New Jersey, its officers, agents and representatives, its citizens and all other persons are perpetually enjoined from disputing the *sovereignty, jurisdiction and dominion of the State of Delaware over the territory adjudged to the State of Delaware by this decree.*"

The word "dominion,"[80] especially when used together with the words "sovereignty" and "jurisdiction," necessarily implies ownership.

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[80] "'Dominion' is a word of definite legal meaning and means ownership or right to property or perfect or complete property or ownership in a thing. *Whelan v. Henderson,* Tex. Civ. App., 137 S. W. 2d 150, 153." (13 Words and Phrases, Cum. An. Pock. Part, 51.)

Gruber v. Pac, States Sav. & Loan Co., 13 Cal. (2d) 144, 148;

Fisher v. Pickwick, 42 Cal. App. (2d) Supp. 823, 825-826;

Kee v. Becker, 54 Cal. App. (2d) 466, 470.

(c) LOUISIANA v. MISSISSIPPI, 202 U. S. 1 (1906).

This case involved the boundary between Louisiana and Mississippi. However, the dispute arose over the validity of an Act of the Legislature of Louisiana prohibiting non-residents from "fishing oysters in Louisiana waters."

The Court determined that the boundary extends from the Pearl River

> ". . . thence south along the channel of that river to Lake Borgne. Pearl river flows into Lake Borgne, Lake Borgne into Mississippi Sound and Mississippi Sound *into the open Gulf of Mexico,* . . ." (p. 48.)

The problem was thus presented of locating the boundary through Lake Borgne and Mississippi Sound. Here the Court applied the doctrine of the Thalweg or "deep water channel." Mississippi contended that the rule of Thalweg

> "expires by its own limitation when such midchannel reaches Lake Borgne, which in contemplation of the rule is the open sea, and part of the waters of the Gulf of Mexico." (pp. 51-52.)

The Court rejected this argument on the ground that Lake Borgne and Mississippi Sound is not open sea, but an arm of the sea having a deep water channel. The rule of Thalweg was, therefore, applied until the deep water channel line reached the open sea, but obviously it could have no application *in* the open sea. To negative the inference that ownership stopped where the rule of Thalweg ceased to be applicable the Court held (p. 52):

> "The maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian States, which can exclusively reserve the fishery within their respective maritime belts for their own citizens, whether fish, or pearls, or amber,

> or other products of the sea. See *Manchester v. Massachusetts*, 139 U. S. 240; *McCready v. Virginia*, 94 U. S. 391."

It is important to note that the Court cited the *Manchester* and *McCready* cases. Plaintiff has insisted that the *McCready* case applies only to "inland waters." If so, it is pertinent to ask why this Court cited it in support of the statement above quoted. The answer is plain. The Court was referring to the basic principle set forth in the *McCready* case, namely, that

> "each State owns the beds of all tide waters within its jurisdiction, . . ." (94 U. S. 391, 394.)

thus demonstrating that the Court was of the view that this principle applies as well to the maritime belt as to "inland waters."

That the Court intended to hold that the State owned this maritime belt is further evidenced by the following excerpt (pp. 52-53):

> "Islands formed by alluvion were held by Lord Stowell, in respect of certain mud islands at the mouth of the Mississippi, to be 'natural appendages of the coast on which they border, and from which indeed they are formed.' *The Anna* (1805), 5 C. Rob. 373."

The Court did say in this case that it was unnecessary to determine "the breadth of the maritime belt," but it did not say that it was unnecessary to determine that the States owned such a belt, and the case does determine that precise question. This is further borne out by the decree, which reads, in part (pp. 58-59):

> "It is further ordered, adjudged and decreed that the State of Mississippi, its officers, agents and citi-

zens, be and they are hereby enjoined and restrained from *disputing the sovereignty and ownership of the State* of Louisiana in *the land and water territory* south and west of said boundary line as laid down on the foregoing map."

The effect of the decision was to uphold the statute of Louisiana which applied to "Louisiana waters." If Louisiana had not owned the soil beneath the waters along her coasts, this statute excluding non-residents from taking oysters would not have been valid. This Court has held that the right of a State to exclude non-residents from taking fish from its waters is predicated on ownership of the soil.[81] In other words, if the soil under the marginal sea had been owned by the United States, the privileges and immunities clause in the Constitution would have prevented Louisiana from reserving the oyster beds and other products of the soil for her own citizens. The same principles must apply to minerals.

(d) ILLINOIS CENTRAL R. R. Co. v. ILLINOIS, 146 U. S. 387 (1892).

This case involved the waters of Lake Michigan within the boundaries of that State. The Court held that the States have title to the bed of the sea, and that the Great Lakes are "open seas." On this ground it was held that Illinois owned the bed of Lake Michigan. The case is, therefore, in effect, a decision on the ownership of the beds

[81] *Smith v. Maryland*, 18 How. 71 (1855); *McCready v. Virginia*, 94 U. S. 391 (1876); *Manchester v. Massachusetts*, 139 U. S. 240 (1891).

of the open sea within the boundaries of a State. The Court held (pp. 435-437):

> "It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by *tide waters, within the limits of the several States,* belong to the respective States within which they are found, . . . *Pollard's Lessee v. Hagan,* 3 How. 212; *Weber v. Harbor Commissioners,* 18 Wall. 57.
>
> "The same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes over which is conducted an extended commerce with different States and foreign nations. *These lakes possess all the general characteristics of open seas,* except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the State of lands *covered by tide waters* that is not equally applicable to its *ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes.*"

(e) MASSACHUSETTS v. NEW YORK, 271 U. S. 65 (1926).

This case, from which we have already quoted (*supra,* pp. 32, 68), holds that the State of New York is the owner of the land in the bed of Lake Ontario within its boundaries. This ownership is equivalent in every respect to the ownership of lands in the open sea out to the State's boundary. If, as plaintiff asserts, it is necessary to the exercise of the Federal Government's powers of external sovereignty that it own the three-mile belt of the open sea, on the same reasoning it would be necessary for the Federal Government to own the bed of the Great Lakes to the

international boundary line. The direct holding of this Court in the *Illinois* and *New York* cases completely destroy plaintiff's theory that ownership of the waters along the coasts of this nation has anything to do with the exercise by the Federal Government of its constitutional duties, either of national defense or otherwise. To the same effect see *United States v. Chandler-Dunbar Water Co.*, 209 U. S. 447 (1908), regarding the ownership by the State of waters in a river which forms the international boundary. (*Supra*, pp. 70-71.)

CALIFORNIA AND OTHER STATE COURT DECISIONS.

The California Supreme Court in *Boone v. Kingsbury*, 206 Cal. 148 (1929)[82] decided that the State of California was the owner of the submerged lands in the Pacific Ocean along the entire coast of California within the State's boundaries. In reliance upon the decisions of this Court in *Hardin v. Jordan*, 140 U. S. 371; *Shively v. Bowlby*, 152 U. S. 1 and *Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387, the California court held (p. 190):

> "Such title to the shore and lands under water is regarded as incidental to the sovereignty of the State—a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery—and cannot be retained or granted out to individuals by the United States. Such title being in the State, the lands are subject to State regulation and control, . . ."

[82] Certiorari denied, 280 U. S. 517.

A number of other California decisions have followed and applied the rule of *Boone v. Kingsbury* under the 1921 offshore leasing statutes.[83]

The Florida Supreme Court said in *Freed v. Miami Beach Pier Corporation,* 112 So. 841, 844 (1927), that:

> "Upon the admission of the state of Florida . . . . the lands within the territorial limits of the state below ordinary high-water marks of the ocean and gulf and other navigable waters became the property of the state by virtue of its sovereignty. See the Abby Dodge, 223 U. S. 166, 32 S. Ct. 310, 56 L. Ed. 390."

In 1931 the Florida Supreme Court said in *Lipscomb v. Gialourakis,* 133 So. 104, 106, that:

> "All the bottoms of the gulfs and natural bays within the limits of the state of Florida passed to the state of Florida in its sovereign capacity when Florida was admitted into the Union."[84]

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[83] *Kelley v. Kingsbury* (1930), 210 Cal. 37; *Joyner v. Kingsbury* (1929), 97 Cal. App. 17; *Carr v. Kingsbury* (1931), 111 Cal. App. 165; *Feisthamel v. Kingsbury* (1931), 111 Cal. App. 762; *Cummings v. Kingsbury* (1931), 111 Cal. App. 763; *Joyner v. Kingsbury* (1931), 111 Cal. App. 764; *Maggart v. Kingsbury* (1931), 111 Cal. App. 765; *Stone v. City of Los Angeles* (1931), 114 Cal. App. 192; *Farry v. King* (1932), 120 Cal. App. 118; *Hollister v. Kingsbury* (1933), 129 Cal. App. 420; *General Pet. Corp. v. Hobson* (D. C. Cal. 1927), 23 F. (2d) 349; *Bankline Oil Co. v. Comm.* (C. C. A. 9, 1937), 90 F. (2d) 899; *Helvering v. Bankline Oil Co.* (1938), 303 U. S. 362; *Spalding v. United States* (D. C. Cal. 1937), 17 Fed. Supp. 957; *Spalding v. U. S.* (C .C. A. 9, 1938), 97 F. (2d) 697; *Stockburger v. Jordan* (1938), 10 Cal. (2d) 636; *Miller v. Stockburger* (1938), 12 Cal. (2d) 440.

[84] See also *Deering v. Martin* (Florida 1928), 116 So. 54, 61; *Perky Properties v. Felton* (Florida 1934), 151 So. 892, 895.

The New York Appellate Division in 1927 in *People ex rel. Mexican Telegraph Company v. State Tax Commission,* 220 N. Y. S. 8, 17, Note 10, said that:

> "State owns land under water within three-mile limit."

In *People v. Reilly,* 14 N. Y. S. (2d) 589, 592 (Magistrates' Court 1939), the court said that:

> "The State owns and has jurisdiction over all land under water within the three-mile limit. People *ex rel.* Mexican Tel. Co. v. State Tax Commissioner, 219 App. Div. 401, 220 N. Y. S. 8."

State v. Pollock, 239 Pac. 8, 10 (Wash. 1925), states that:

> ". . . the jurisdiction and dominion of the state extends to the three-mile limit offshore."[85]

TREATISES.

2 *Lindley on Mines* (3d ed. 1914), Section 429, page 1016, states that:

> "When a state bordering upon these waters is admitted into the Union it becomes, by virtue of its sovereignty, the owner of all lands extending seaward so far as its municipal dominion extends,—

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[85]To the same effect: *Sutton v. Peckham* (1920), 48 Cal. App. 88; *Dunham v. Lamphere* (1855), 69 Mass. (3 Gray) 268. See *Commonwealth v. Boston Terminal Company* (Mass. 1904), 70 N. E. 125; *Pope v. Blanton* (1935, D. C. Fla.), 10 Fed. Supp. 18, dismissed for lack of jurisdiction 299 U. S. 521; *Bosarge v. State* (Alabama 1929), 120 So. 427, cert. den. 280 U. S. 568.

. . . from the line of ordinary high tide on the shore of the open ocean seaward to the distance of three miles, or a marine league."

2 Thornton, *Oil and Gas* (Willis, 5th ed. 1932), Section 476, page 797, states that:

"Mineral beneath . . . the sea belongs to the State."

45 C. J., page 540, Note 78(b), states that:

"Within the three-mile limit, a state owns land submerged by the sea."

27 Ruling Case Law, page 1358, states that:

Under the common law of England the title to the bed of the sea below high water mark . . . was in the Crown. . . . In the United States the several states have succeeded to all the right of the Crown and Parliament in the soil under navigable tide waters, and each, subject to limitations to be found in the federal constitution, has the ownership and control of all the navigable waters and the bed thereof within its limits."

Tiffany, *Real Property* (3d Ed., 1939), Vol. 3, p. 638:

"The land under navigable waters within the limits of the territory ceded to the United States, either by one of the states or by a foreign country, passed to the United States for the benefit of the whole people, and in trust for the several states to be ultimately

created out of such territory, and, upon the admission of any part of such territory as a state, such lands pass *ipso facto* to the state government, . . ."

Gould, *Waters* (2nd Ed., 1891), p. 75:

"At the time of the Revolution, when the people became sovereign, the respective States succeeded to the title of the Crown in the tide waters within their territorial limits, . . ."

Angell, *Tide Waters* (2nd Ed., 1847), pp. 55, 53, 57:

"The original states, in virtue of their royal charters, are entitled to the navigable waters within their territory, . . ."

"The next question is, whether the *new* states of the Union, or those which have been admitted since the revolution, stand upon the same footing as the *original* states; or whether the sovereign right of property in the tide waters within the jurisdictional limits of a new state, is transferred to the state government, or remains in the general government."

". . . the shores of navigable waters, and the soil under them, were not granted by the constitution to the United States, but were reserved to the states respectively; and . . . . the *new* states have the same rights, sovereignty and jurisdiction over the subject as the *original* states."[86]

[86]Italics in Angell.

I. Rule of Property.

1. Rationale of the Rule of State Ownership.

It must be strikingly apparent from the numerous cases already cited that the courts have never predicated property rights or governmental powers upon any distinction as between "inland waters" (including bays, harbors and waters between high and low tide) on the one hand and the marginal sea on the other.

The reason no such distinction was ever made is that the rationale of the principle of State ownership is the same as to all navigable waters within the State's boundary. Navigability is the sole criterion. Navigability is not dependent on whether the waters are salt or fresh, or whether they are land-locked or in the open sea below low-water mark.

This principle is graphically illustrated in the case of *Barney v. Keokuk*, 94 U. S. 324 (1876), a case involving the bed of the Mississippi River. Regarding the title to the bed of that river, and particularly to accretions which attached to land on a navigable river, this Court said (pp. 337-8):

> ". . . By the common law, as before remarked, such additions to the land on navigable waters belong to the crown; but as the only waters recognized in England as navigable were tide-waters, the rule was often expressed as applicable to tide-waters only, although *the reason of the rule* would equally apply to navigable waters above the flow of the tide; that reason being, that the public authorities ought to have entire control of the great passageways of commerce and navigation, to be exercised for the public advantage and convenience. . . . In our view of the subject the correct principles were laid down in *Mar-*

tin v. Waddell, 16 Pet. 367; *Pollard's Lessee v. Hagan,* 3 How. 212, and *Goodtitle v. Kibbe,* 9 *id.* 471. These cases related to *tide-waters,* it is true; but they enunciate principles which are equally applicable to *all navigable waters.*"

It will be seen that the rule of State ownership is based *solely* on the ground that the waters are navigable, not on the character of the waters as "inland waters" or waters of the sea.

This rationale is further elaborated by this Court in the case of *Illinois Central R. R. Co. v. Illinois,* previously discussed. The Court held (146 U. S. 387, 435-437):

"It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by *tide waters, within the limits of the several States,* belong to the respective States within which they are found, . . . *Pollard's Lessee v. Hagan,* 3 How. 212; *Weber v. Harbor Commissioners,* 18 Wall. 57.

"*The same doctrine* is in this country held to be applicable to lands covered by fresh water in the Great Lakes . . . . and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the State of lands *covered by tide waters* that is not equally applicable to its *ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes.* . . .

". . . by the common law, the doctrine of the dominion over and ownership by the crown of lands *within the realm under tide waters* is not founded upon the existence of the tide over the lands, but upon the fact that the waters *are navigable,* . . ."

Plaintiff concedes that the language employed by this Court in its decisions, is

> "susceptible of an interpretation that would include lands under the marginal sea." (Br. p. 155.)

However, plaintiff attempts to explain away this language on the ground that it was "probably merely fortuitous," by which we assume plaintiff means it was a mere accident that the Court repeatedly said that the States were the owners of the lands beneath all navigable waters within their boundaries.

Even if it could be assumed that an accident such as this could happen consistently in dozens of decisions over a period of one hundred years, still that argument ignores the fact that the court was in each instance stating *the rationale of the rule of State ownership of lands beneath navigable waters*—and the rationale is the same for both "inland waters" and marginal sea. The court was therefore setting forth in each case a general principle which required only specific application to the particular facts before the Court. This being so, it is entirely erroneous to say that this language was careless or fortuitous *obiter dictum*. The truth is that it was the basic principle upon which State ownership in each case had to be predicated.

It is a well settled rule of law in this Court that the considered enunciation of a principle of law upon which a decision is based does not constitute *obiter dictum*. (See cases cited *infra*, p. 128 *et seq.*)

It is also well settled that the repeated expression of a general principle upon which titles to property have become predicated constitutes a rule of property of the kind which this Court has consistently, throughout its history, declined to overrule. (See cases *infra*, pp. 130-137.)

We desire at this point to set forth in skeleton form a series of pronouncements on this subject by this Court which demonstrate that the rule of State ownership has been adopted by this Court as a fundamental principle of public law which has become a rule of property.

It is important to notice that in each of the quotations two elements are expressly or impliedly present. One, the factor of navigability, and the other that State ownership is co-extensive with the jurisdiction (boundaries) of the State.

2. Supreme Court Cases.

Chief Justice Taney, in 1842 in the first case establishing the rule, said:

> "For when the Revolution took place the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soils under them . . . "[87]

Mr. Justice McKinley in 1845 said:

> "First, the shores of navigable waters, and the soils under them, were not granted by the constitution to the United States, but were reserved to the states respectively. Secondly, the new states have the same rights, sovereignty, and jurisdiction over the subject as the original states."[88]

Mr. Justice Clifford in 1867 said:

> "Settled rule of law in this court is, that the shores of navigable waters and the soils under the same in the original states were not granted by the Constitution to the United States, but were reserved

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[87] *Martin v. Waddell* (1842), 16 Peters 367, 410.
[88] *Pollard v. Hagan* (1845), 3 How. 212, 229.

to the several states, and that the new states since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original states possess within their respective borders. When the Revolution took place, the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soils under them. . . ."[89]

Mr. Justice Field in 1873, for a unanimous court that included Chief Justice Chase, said

"all soils under the tide waters within her limits passed to the State";[90]

Mr. Justice Bradley in 1876 said:

"In our view of the subject the correct principles were laid down in Martin v. Waddell, 16 Pet. 367, Pollard's Lessee v. Hagan, 3 How. 312, and Goodtitle v. Kibbe, 9 How. 471. These cases related to tidewaters, it is true; that they enunciated principles which are equally applicable to all navigable waters . . . it [the bed and shore of such waters] properly belongs to the State by their inherent sovereignty . . ."[91]

Chief Justice Waite in 1876 said:

". . . each State owns the beds of all tide-waters within its jurisdiction . . .";[92]

Mr. Justice Field in 1891 said:

". . . the titles acquired by the United States to lands in California under tide-waters, from Mexico, were held in trust for the future State, so that their

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[89] *Mumford v. Wardwell* (1867), 6 Wall. 423, 436.
[90] *Weber v. Harbor Commissioners* (1873), 18 Wall. 57, 66.
[91] *Barney v. Keokuk* (1876), 94 U. S. 324, 336.
[92] *McCready v. Virginia* (1876), 94 U. S. 391, 394.

ownership and right of disposition passed to it upon its admission into the Union, . . ."[93]

Mr. Justice Lamar in 1891 said:

"It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original States were reserved to the several States and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders."[94]

Mr. Justice Gray in 1894 said:

"The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions."[95]

Mr. Justice Holmes in 1903 said:

". . . the grounds for the decision must be quite different from the considerations affecting the conveyance of land bounded on navigable water. In the latter case the land under the water does not belong to the United States, but has passed to the State by its admission to the Union."[96]

Chief Justice Fuller in 1906 said:

"the maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian States which can exclusively reserve the fishery within their respective maritime belts for

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[93]*San Francisco v. Leroy* (1891), 138 U. S. 656, 670-671.

[94]*Knight v. United States Land Association* (1891), 142 U. S. 161, 183.

[95]*Shively v. Bowlby* (1894), 152 U. S. 1, 57.

[96]*Hardin v. Shedd* (1903), 190 U. S. 508, 519.

their own citizens, whether fish, or pearls, or amber, or other products of the sea";[97]

Mr. Justice [illegible]nes in 1908 said:

"The right of the State to grant lands covered by tide waters or navigable lakes and the qualifications, as stated in Shively v. Bowlby, 152 U. S. 1, 47, are that the State may use or dispose of any portion of the same 'when that can be done without substantial impairment of the interest of the public in such waters, . . .' "[98]

Chief Justice White said in 1912:

"each State owns the beds of all tide-waters within its jurisdiction";[99]

Mr. Justice Brandeis in 1921 said:

". . . Washington became . . . the owner of the navigable waters within its boundaries and of the land under the same."[100]

Chief Justice Taft in 1926 said:

"all the proprietary rights of the Crown and Parliament in, and all their dominion over, lands under tide-water vested in the several states;"[101]

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[97] *Louisiana v. Mississippi* (1906), 202 U. S. 1, 52.

[98] *United States v. Chandler-Dunbar Water Power Co.* (1908), 209 U. S. 447, 451.

[99] *Abby Dodge* (1912), 223 U. S. 166, 174.

[100] *Port of Seattle v. Oregon & W. R. R. Co.* (1921), 255 U. S. 56, 63.

[101] *Appleby v. New York* (1926), 271 U. S. 364, 381.

Chief Justice (then Mr. Justice) Stone in 1935 said that:

> "lands underlying navigable waters within the States passes to [the States];"[102]

Chief Justice Hughes said in 1935:

> "The soils under tidewaters within the original states were reserved to them respectively, and the states since admitted to the Union have the same sovereignty and jurisdiction in relation to such lands within their borders as the original states possessed;"[103]

Chief Justice Hughes in 1935 said:

> "Pollard v. Hagan, 3 How. 212, Shively v. Bowlby, 152 U. S. 1, and Port of Seattle v. Oregon-Washington R. Co., 255 U. S. 56, dealt with the title of the States to tidelands *and the soil under navigable waters within their borders.* See Borax Consolidated v. Los Angeles, 296 U. S. 10, 15."[104]

The rule has been stated in substantially the same words by more than 25 other justices of this Court over a period of the last 100 years,[105] as well as by numerous judges of

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[102] *United States v. Oregon* (1935), 295 U. S. 1, 14.

[103] *Borax Consolidated v. Los Angeles* (1935), 296 U. S. 10, 15.

[104] *Ashwander v. Tennessee Valley Authority* (1936), 297 U. S. 288, 337.

[105] *Goodtitle v. Kibbe* (1850, Taney, C. J.), 9 How. 470, 477;
Den v. Jersey Company (1853, Taney, C. J.), 15 How. 426, 432-433;
Smith v. Maryland (1855, Curtis, J.), 18 How. 71, 74;
County of St. Clair v. Lovingston (1874, Swayne, J.), 90 U. S. 46, 68;
City of Hoboken v. Penn. R. Co. (1888, Mathews, J.), 124 U. S. 656, 688;
Manchester v. Massachusetts (1890, Blatchford, J.), 139 U. S. 240, 256;
Hardin v. Jordan (1891, Bradley, J.), 140 U. S. 371, 381;

the lower Federal Courts.[106]

Illinois Central Railroad v. Illinois (1896, Field, J.), 146 U. S. 387, 485;
St. Anthony Falls Water Power Co. v. St. Paul Water-Commissioners (1897, Peckham, J.), 168 U. S. 349, 365;
Mobile Transportation Co. v. Mobile (1903, Brown, J.), 187 U. S. 479, 482;
United States v. Mission Rock Co. (1903, McKenna, J.), 189 U. S. 391, 392;
Scott v. Lattig (1913, Van Devanter, J.), 227 U. S. 229, 243;
Donnelly v. United States (1913, Pitney, J.), 228 U. S. 243, 261;
Greenleaf Lumber Co. v. Garrison (1915, McKenna, J.), 237 U. S. 251, 259;
United States v. Coronado Beach Co. (1921, Holmes, J.), 255 U. S. 472, 487;
Brewer-Elliott Oil Co. v. United States (1922, Taft, C. J.), 260 U. S. 77, 85;
Oklahoma v. Texas (1922, Van Devanter, J.), 258 U. S. 574, 583;
United States v. Holt Bank (1926, Van Devanter, J.), 270 U. S. 49, 54;
Massachusetts v. New York (1926, Stone, J.), 271 U. S. 65, 89);
Fox River Company v. Railroad Commission (1927, Stone, J.), 274 U. S. 651, 655;
United States v. O'Donnell (1938, Stone, J.), 303 U. S. 501, 519.

[106] *Spalding v. United States* (D. C. Cal., 1937), 17 Fed. Supp. 966, affirmed (C. C. A. 9) 97 F. (2d) 701; involving California submerged land lease No. 92, held by Pacific Western Oil Corporation; *Spalding v. United States* (D. C. Cal., 1937), 17 Fed. Supp. 957, involved California submerged land lease No. 93, in which Pacific Western Oil Corporation held an interest. These areas are described in the Complaint of the United States in the instant proceeding and extend 3 of a mile into the Pacific Ocean and Santa Barbara Channel. In referring to these submerged land areas located in the Pacific Ocean and Santa Barbara Channel, the District Court there said:

> "The tidelands of California are held by the State in trust for the people for the purpose of navigation, commerce and fishery. The Constitution of California, art. 15, sec. 2; Borax Consolidated v. Los Angeles (1935), 296 U. S. 10 . . .; Illinois Central Railroad Company v. Illinois (1892), 146 U. S. 387, 452, . . . Boone v. Kingsbury (1928), 206 Cal. 148.
>
> "While the State is prohibited from alienating the tidelands . . ., general leasing statutes allowing their leasing

Thus, for a period of more than 100 years this Court, in determining questions of the ownership of submerged lands, has consistently used language expressly including all lands under navigable waters within the respective boundaries of the States. And during this entire period of time, *no Justice of this Court has dissented from any of the decisions on the ground that the language used was too broad a statement of the governing principle.* Furthermore, many of the decisions in which this principle has been enunciated are among the most carefully considered cases in the history of the Supreme Court.

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exist. . . ." Affirmed (C. C. A. 9), 97 F. (2d) 697, cert. den. 305 U. S. 644.

Bankline Oil Company v. Commissioner, 90 F. (2d) 899 (C. C. A. 9, 1937), affirmed in part 303 U. S. 362, involved California submerged land lease No. 89 in the Elwood Oil Field, being a lease extending ¾ of a mile into the Pacific Ocean and Santa Barbara Channel. The Circuit Court of Appeals there said (90 F. (2d) 900):

> "The State of California holds the tidelands within its boundaries in its sovereign capacity in trust 'for the people of the State . . .' *Boone v. Kingsbury*, 206 Cal. 148, 183. . . . The petitioner's lease was granted pursuant to the Statutes of California, 1921, C. 303, P. 404, entitled, 'An Act to reserve all minerals in State lands,' etc. By this Act, the State has reserved the mineral deposits in all lands belonging to the State. . . . One of the purposes of the aforesaid Act . . . is to . . . . . reduce to useful purposes oil, gas and mineral deposits *reposing beneath the Ocean's bed.*' Boone v. Kingsbury, 206 Cal. 148, 181."

McCloskey v. Pacific Coast Co. (C. C. A. 9, 1908), 160 Fed. 794, 796:

> "The common law has, by act of Congress, been declared to be in force in the territory of Alaska. By the common law of England, the King was the owner of the bed of the ocean and of everything below the line of ordinary high tide . . ."

Dean v. City of San Diego (D. C. Cal., 1925), 275 Fed. 228, 231.

Pope v. Blanton (D. C. Fla., 1935), 10 F. Supp. 18, reversed on another point, 299 U. S. 521.

3. California Decisions.

The California Supreme Court has declared this rule on many occasions.

In 1886, in *Lux v. Haggin,* 69 Cal. 255, 335, the court said:

> *"Upon the admission of California into the Union, this state became vested with all the rights, sovereignty, and jurisdiction in and over navigable waters, and the soils under them, which were possessed by the original states after the adoption of the Constitution of the United States,"*[106a] citing *Martin v. Waddell* and *Pollard v. Hagan.*

In 1904, the California Court in *S. F. Savings Union v. R. G. R. Petroleum & Min. Co.,* 144 Cal. 134, 135, said:

> "It is the general rule in this country that absolute property in and dominion and sovereignty over the soils under the tide-water in the several states belong to the state in which such lands are situate. (Shively v. Bowlby, 152 U. S. 1, and cases cited.)"

In 1913, the California Court, in *People v. California Fish Co.,* 166 Cal. 576, 584, quoted the rule from *Martin v. Waddell,* and *Illinois Central Ry. Co. v. Illinois.*

In 1918, the California Court, in *Churchill Co. v. Kingsbury,* 178 Cal. 554, 558, quoted from *Pollard v. Hagan* that:

> " 'First, the shores of navigable waters, and the soils under them, were not granted by the Consti-

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[106a] Italics are those of the court.

tution to the United States, but were reserved to the states respecively. Secondly, the new states have the same rights, sovereignty, and jurisdiction over the subject as the original states.'" and the Court also quoted the rule from *Barney v. Keokuk.*

In 1928, the California Court, in *Boone v. Kingsbury,* 206 Cal. 148, 190, quoted the rule from *Hardin v. Jordan.*

In 1930, the California Court, said in *People v. Monstad,* 209 Cal. 658, 661, of the legislative grant to the City of Redondo Beach conveying the submerged lands out to the three-mile limit:

> "The title to the tide and submerged lands undoubtedly is in the state, . . ."

In 1931, the California Court, in *Southlands Co. v. City of San Diego,* 211 Cal. 646, 664, said

> "In this state lands underlying navigable waters and tidelands belong to the state, . . ."[107]

4. Principle of Law—Not Dictum.

The difference between the formulation of a principle or rule of law and mere *dictum* is well illustrated in the opinion of Mr. Justice Douglas in *Screws v. United States,* 325 U. S. 91 (1945), where the Court had before it a question as to the meaning of the phrase "under

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[107] Many other California decisions declare the same rule, for example: *Ross v. Burkhard Investment Co.* (1928), 90 Cal. App. 201, 207; *Western Pac. Ry. Co. v. So. Pac. Co.* (C. C. A. 9, 1907), 151 Fed. 376, 401; *Forestier v. Johnson* (1912), 164 Cal. 24, 30; *Hihn Co. v. Santa Cruz* (1915), 170 Cal. 436, 442.

color of any law" as used in Section 20 of the Criminal Code, and where a construction of that phrase in broad terms had been made in a prior case. It was there said (pp. 112-113):

> "But beyond that is the problem of *stare decisis*. The construction given §20 in the *Classic* case *formulated a rule of law* which has become the basis of federal enforcement in this important field. The rule adopted in that case was formulated *after mature consideration*. It should be good for more than one day only. We do not have here a situation comparable to *Mahnich v. Southern S. S. Co.*, 321 U. S. 96, where we overruled a decision demonstrated to be a sport in the law and inconsistent with what preceded and what followed. *The Classic case was not the product of hasty action or inadvertence. It was not out of line with the cases which preceded. It was designed to fashion the governing rule of law in this important field.*"[108]

A clear statement of this proposition is found in the article by Dean Keeton of the University of Oklahoma Law School. In "Federal and State Claims to Submerged Lands Under Coastal Waters," 25 *Texas Law Review* (January, 1947), pages 262, 269, he states:

> "Nevertheless, with respect to navigable waters within the states, the law is well settled. As regards

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[108] A similar view was expressed in *Helvering v. Fitch*, 309 U. S. 149, 156 (1940), where it was held that the respondent had not shown that his case fell outside *a general rule* concerning the treatment of alimony payments as income which had been established in a prior case.

> submerged lands under coastal waters, it has been urged that the cases in which state ownership has been asserted do not involve land below the low water mark and outside of harbors and bays. But the fact that the courts have used as a *principle one that was broader than necessary to decide the case does not, of course, make the use of the principle dictum.* . . . If there is anything to the principle of *stare decisis* as regards property rights, and there is more justification for it in this field than perhaps any other, then it would seem that the law is well-settled to the effect that the states formed out of territory are in no different position from the thirteen original states as regards ownership of submerged lands. . . . .

Furthermore, even dictum, when oft-repeated over a long period of time, may become part of the established law and a rule of property. In *United States v. Guaranty Trust Company*, 33 F. (2d) 533 (C. C. A. 8th, 1929), affirmed 280 U. S. 478 (1930), the Circuit Court of Appeals said (pp. 536-537):

> "The contention of the government is that the doctrine announced by the decisions just cited, upon which appellees rely, was dictum merely, and therefore not entitled to weight as a determination by the Supreme Court; . . . it may be said that while, strictly speaking, the rule announced by the Supreme Court in a number of these cases may be regarded as dictum, nevertheless *the reannouncement of the doctrine repeatedly over a period of more than 100 years serves to establish it, not only as the consistent view of the court, but also as a rule of property upon which practical transactions have been, and are being, based.*"

15 C. J. 953, states that:

> "Dicta, while not binding in themselves, may become finally a part of the recognized law of the land. . . . So where there is an accepted dictum of the law which has long formed the basis of contracts, and upon the faith of which rights have vested, the courts will decline to overrule it."

As a result of the repeated enunciations by this Court over a period of 105 years of the principle that the States own the beds of *all navigable waters within their respective boundaries,* a rule of property has been established applying not only to bays, harbors, rivers and lakes but also to lands beneath all other navigable waters, including the open sea, within the respective territorial jurisdictions of the States. In *United States v. Mission Rock Co.,* 189 U. S. 391 (1903), a case involving the application to submerged lands in California of the very principle here under consideration, this Court said (p. 406):

> "The decisions cover a period of many years and have become a rule of poperty and the foundation of many titles."

This rule of property has been relied upon by California as well as by the other coastal states of the Union and by many individuals claiming under them. The details of such reliance upon this rule of property are set forth *infra,* pages 143-149; Appendix F, pages 117 *et seq.*

In *Minnesota Company v. National Company,* 3 Wall. 332 (1865), where this Court was asked to re-examine a question of title to real property which had been decided by it ten years earlier, the Court said (p. 334):

> "Where questions arise which affect titles to land it is of great importance to the public that when

> they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change."

The same rule was applied in *United States v. Title Insurance and Trust Company,* 265 U. S. 472 (1924), where the Court was asked to overrule a decision on title to land which had been made in 1901, and where the Court said (p. 486):

> "The question whether that decision shall be followed here or overruled admits of but one answer. The decision was given twenty-three years ago and affected many tracts of land in California, particularly in the southern part of the State. In the meantime there has been a continuous growth and development in that section, land values have enhanced, and there have been many transfers. Naturally there has been reliance on the decision. The defendants in this case purchased fifteen years after it was made. *It has become a rule of property, and to disturb it now would be fraught with many injurious results."*[109]

In *Kean v. Calumet Canal Co.,* 190 U. S. 452 (1903), Mr. Justice Holmes, speaking for the Court, said (p. 460):

> "It is not necessary to consider how we should decide the case with our present light if the ques-

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[109]To the same effect are *California v. Deseret Water etc. Co.,* 243 U. S. 415, 421 (1917); *McMichael v. Murphy,* 197 U. S. 304, 312-313 (1905); *Dunn v. Micco,* 106 F. (2d) 356, 359 (C. C. A. 10th, 1939).

> tion were a new one. It is not new. For twelve years the decisions in *Hardin v. Jordan* and *Mitchell v. Smale* have stood as authoritative declarations of the law. . . . Meantime many titles must have passed on the faith of those decisions . . . It seems to us that it would be likely to do more harm than good to allow them to be called in question now."

The philosophy of Mr. Justice Holmes was always consistent on this subject as shown by his earlier decisions while a member of the Massachusetts Supreme Judicial Court. In 1886 he said in *Carpenter v. Walker*, 140 Mass. 416, 420, that:

> "It is more important to respect decisions upon a question of property than to preserve a simple test."

Again, in 1888 Mr. Justice Holmes said in *Sewall & Co. v. Boston Water Power Co.*, 147 Mass. 61, 64, that:

> "We cannot disturb a rule of property which has been acted on so long, on the strength of general reasoning."

So far as we can discover, this Court, in its history, has overruled approximately seventy cases.[109a] Only two of these could be said to involve rules of property and in each instance the case was reversed in order to restore

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[109a] Forty such overruled cases are referred to in the dissenting opinion of Mr. Justice Brandeis in *Burnet v. Coronado Oil and Gas Co.*, 285 U. S. 393, 406-409, notes 1-4 (1932), and research has revealed an additional thirty cases which have been overruled by this Court since the *Burnet* decision in 1932.

a rule of property which had been inadvertently overruled in the previous case. One such case was *Gazzam v. Phillips,* 20 How. 372 (1857), which overruled an earlier decision in *Brown v. Clements,* 3 How. 650 (1844). The *Brown* case had itself overruled a practice theretofore followed by the Land Department in connection with the sale of fractional sections of public lands, and in the *Gazzam* case the Court restored the rule previously established by the Land Department and in effect said that it was the *Brown* case which had overruled the rule of property.[110]

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[110]In the *Gazzam* case the Court said (p. 377):

"The only difficulty we have had in this case arises from the circumstance that a different opinion was expressed by a majority of this court [Chief Justice Taney and Justices Catron and Daniel dissenting] in the case of *Brown's Lessee v. Clements* (3 How. p. 650). That opinion differed from the construction of the Act of 1820, given by the head of the land department, and disapproved of the practice that had grown up under it in making the public surveys; and also from the opinion, subsequently confirming this construction and practice, by the Secretary of the Treasury and Attorney General, as late as the year 1837. The decision in *Brown v. Clements* was made in the December term, 1844.

"It is possible that some rights may be disturbed by refusing to follow the opinion expressed in that case; but we are satisfied that far less inconvenience will result from this dissent, than by adhering to a principle which we think unsound, and which, in its practical operation, will unsettle the surveys and subdivisions of fractional sections of the public land, running through a period of some twenty-eight years. Any one familiar with the vast tracts of the public domain surveyed and sold, and tracts surveyed and yet unsold, within the period mentioned, can form some idea of the extent of the disturbance and confusion that must inevitably flow from an adherence to any such principle. We cannot, therefore, adopt that decision or apply its principles in rendering the judgment of the Court in this case."

The other instance of the overruling of a rule of property occurred in *Fairfield v. County of Gallatin*, 100 U. S. 47 (1879), where the Court overruled the earlier case of *Town of Concord v. Portsmouth Savings Bank*, 92 U. S. 625 (1875), involving the validity of a donation of county bonds to a railroad. However, the decision in the *Town of Concord* case was contrary to a prior decision of the Illinois Supreme Court which had not been brought to the attention of the United States Supreme Court in connection with the *Town of Concord* case, and this Court in the *Fairfield* case overruled its earlier decision in order to conform with the rule of porperty established in the state courts.[111]

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[111]The Court in the *Fairfield* case said (pp. 54-55):

> "The bonds in question now were issued in October, 1870. In 1874, the highest court of the State decided that such bonds could be lawfully issued, and that they were not forbidden by the Constitution. It was, therefore, conclusively settled more than a year before *Town of Concord v. Portsmouth Savings Bank* was decided by us, what the meaning of the Constitution was. We are now asked to decline following the construction given and since recognized by the State court, and to adhere to that adopted by us in ignorance of the prior judgment of the State court, and that not, as in *Rowan v. Runnels*, to uphold contracts, but to strike them down, though they were made in accordance with the settled law of the State. We recognize the importance of the rule *stare decisis*. We recognize also the other rule, that this court will follow the decisions of State courts, giving a construction to their Constitutions and laws, and *more especially when those decisions have become rules of property in the States*, and when contracts must have been made, or purchase in reliance upon them. . . . With much more reason may we change our decision construing a State Constitution when no rights have been acquired under it, and when it is made to appear that before the decision was made the highest tribunal of the State had interpreted the Constitution differently, when that interpretation within the State fixed *a rule of property*, and has never been abandoned. In such a case, we think it our duty to follow the State courts, and adopt as the true construction that which those courts have declared."

In overruling cases which have not involved rules of property, this Court has frequently commented on the fact that no such rule was involved, thus emphasizing its special adherence to the doctrine of *stare decisis* in cases where rules of property are concerned.

In *The Genesee Chief*, 12 How. 443 (1851), in which this Court overruled two of its prior decisions and extended admiralty jurisdiction to all navigable waters where commerce is carried on between different states or with foreign nations, Chief Justice Taney said (p. 458):

> "The case of *The Thomas Jefferson* did not decide any question of property, or lay down any rule by which the right of property should be determined. If it had, we should have felt ourselves bound to follow it notwithstanding the opinion we have expressed. For everyone would suppose that after the decision of this court, in a matter of that kind, he might safely enter into contracts, upon the faith that rights thus acquired would not be disturbed. *In such a case, stare decisis is the safe and established rule of judicial policy, and should always be adhered to.*"

The wisdom of preserving rules of property was recognized by Mr. Justice Cardozo, who said:

> "No doubt there are many rules of property or conduct which could not be changed retroactively without hardship or oppression, and this whether wise or unwise in their origin. So far as I am aware, no judge ever thinks of changing them."[112]

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[112]Cardozo, *The Growth of the Law*, p. 121; see also Cardozo, *The Nature of the Judicial Process* (1921), pp. 150-152.

No better illustration of the application by this Court of a rule of property can be found than the decision by Mr. Chief Justice Taney in *Goodtitle v. Kibbe*, 9 How. 470 (1850). In this case the Court was urged to reconsider its decision in *Pollard v. Hagan*. Chief Justice Taney said (pp. 477-478):

> "The question decided in the State Court cannot be regarded as an open one. The same question upon the same act of Congress and Patent was brought before this court in the case of *Pollard v. Hagen*, at January term, 1845, reported in 3 How. 212. *That case was fully and deliberately considered*, as will appear by the report, and the court then decided that the act of Congress and Patent conveyed no title. The decision of the Supreme Court of Alabama, from which this case has been brought up by writ of error, conforms to the opinion of this court in the case of *Pollard v. Hagen*. *And it must be a very strong case indeed, and one where mistake and error had been evidently committed, to justify this court, after the lapse of five years, in reversing its own decision; thereby destroying rights of property which may have been purchased and paid for in the meantime, upon the faith and confidence reposed in the judgment of this court*. But, upon a review of the case, we see no reason for doubting its correctness, and are entirely satisfied with the judgment then pronounced."

The language of Chief Justice Taney is even more apt after the lapse of a century.

VI.

PRESCRIPTION.

(Third Affirmative Defense)

Independently of all other grounds, the title to the soil and subsoil under the marginal sea is vested in the State of California by reason of prescription.

Counsel for plaintiff have asserted (Br. p. 66) that title could not have passed by prescription since there is no such right against the United States, citing five decisions of this Court, each of which, as we show in Appendix F hereto, involved the assertion of a prescriptive right *by an individual.* None of the cases cited by counsel for plaintiff involved a controversy between two States or between State and Nation; and counsel have ignored the controlling line of decisions of this Court on the subject of prescription which govern in controversies between States or between a State and the United States. We will now consider this governing line of decisions:

A. Rule of Law:

1. General Rule of Prescription Between States and Nations.

This Court has adopted, applied and followed, in controversies between two sovereign States, the rule that absolute ownership of territory, land and property is obtained by prescription founded upon uninterrupted possession for a length of time excluding the claims of all other states and nations. This rule was taken from an accepted prin-

ciple of international law governing between nation and nation.[147]

This Court has formulated its own statement of the rule of prescription governing between two States of the Union, in this manner:

> "*Prescription* in international law, says Oppenheim, may be defined as 'the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present

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[147] *Vattel, "Law of Nations,"* Book II, Chap. XI, Sec. 149, as set forth in 1 *Moore, "International Law Digest"* (1906), p. 294; *Wheaton, "Elements of International Law"* (1836 Ed.), Part II, Chap. IV, Sec. 4, quoted in 1 *Moore, "International Law Digest"* (1906), pp. 294-295. To the same effect: *Grotius, "De Jure Belli ac Pacis,"* Book II, Chap. IV, Sec. 9; *Ziegler, "The International Law of John Marshall"* (1939), p. 58; *G. G. Wilson, "International Law"* (1910), pp. 79-85; *G. G. Wilson, "International Law"* (1939 3rd Ed.), pp. 79-80; *Hackworth, "Digest of International Law"* (1940), pp. 432-442; 1 *Moore, "Digest of International Law"* (1906), Sec. 88, pp. 293-297; *Oppenheim, "International Law"* (McNair Ed. 1928, 4th Ed.), pp. 468-470; 1 *Oppenheim's "International Law"* (Lauterpacht's 5th Ed. 1935), Sec. 244, p. 458; 1 *Westlake, "International Law"* (1904), pp. 92-94; 1 *Phillimore, "International Law"* (1854), p. [*265] 212; 1 *Phillimore's "International Law"* (3rd Ed. 1879), pp. 353-366; *Hall, "International Law"* (4th Ed.), Sec. 36, p. 123; Decision of Permanent Court of Arbitration in Matter of Maritime Boundary Dispute between Norway and Sweden, Oct. 23, 1909, reported in 1 *Hackworth, "Digest of International Law"* (1940), p. 439; Arbitral Award in Island of Palmas case between the United States of America and the Netherlands, April 4, 1928, reported in 1 *Hackworth, supra,* pp. 439-441; Chamizal Arbitration Award Between the United Statesof America and Mexico, June 15, 1911, reported in 1 *Hackworth, supra,* p. 441; The Grisbadarna case between Norway and Sweden, Oct. 23, 1909, reported in *Scott, "The Hague Court Reports"* (1916), pp. 121-130; *Ralston, "Prescription"* (1910), 4 Amer. Jr. Intl. Law, pp. 133, 141.

condition of things is in conformity with international order.' . . .

"This principle of *prescription* and acquiescence, when there is a sufficient basis of fact for its application, so essential to the 'stability of order' as between the States of the Union, . . ."[148]

The rule generally, though not always[149] applied in the common law in suits between the sovereign and his subject or citizen, that time does not run against the sovereign in favor of the subject, has no application as between State and State, or as between nation and nation, or as between State and nation.[150]

As stated in *Indiana v. Kentucky*:[151]

"Counsel for Indiana urged, in opposition to the claim of prescription, the maxim *nullum tempus oc-*

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[148]*Arkansas v. Tennessee* (1940), 310 U. S. 563, 570-571. To the same effect: *Maryland v. West Virginia* (1910), 217 U. S. 1, 44; *Michigan v. Wisconsin* (1926), 270 U. S. 295, 307-308; *Louisiana v. Mississippi* (1906), 202 U. S. 1, 53-54; *Indiana v. Kentucky* (1890), 136 U. S. 479, 511; *Virginia v. Tennessee* (1893), 148 U. S. 503, 523-524.

[149]The rule of *nullum tempus occurit regi* is not always maintained in favor of the sovereign as against his subject:

U. S. v. Chavez (1899), 175 U. S. 509, 522. See also *Peabody v. U. S.* (1900), 175 U. S. 546.

[150]*New Mexico v. Texas* (1927), 275 U. S. 279, 295, 298, 300, held the principle of acquiescence applicable as against the United States of America while it held New Mexico as a territory prior to its statehood, the Court saying (p. 300) that:

"This conclusion is reinforced by the tacit and long-continued *acquiescence of the United States*, while New Mexico was a territory, in the claims of those holding the land in controversy under Texas surveys and patents, and the *undisturbed possession* of the Texas claimants."

United States v. Texas (1896), 162 U. S. 1, 61, where it is said that:

"This question deserves the most careful examination; for, *long acquiescence by the General Government* in the claim of Texas would be entitled to great weight."

[151]*Indiana v. Kentucky* (1890), 136 U. S. 479, 500.

curit regi; but this maxim of the common law, governing the relations of sovereign and subject, is manifestly inapplicable to the relations between independent states."[152]

As Mr. Justice Holmes for a unanimous court has so well told us:

> "Take the question of *prescription* in a case like the present. The reasons on which prescription for a public nuisance is denied or may be granted to an individual as against the sovereign power to which he is subject have no application to an independent state. See 1 Oppenheim International Law, 293, §§242-243. It would be contradicting a fundamental principle of human nature to allow no effect to the lapse of time, however long, ..."[153]

2. Period of Time Required:

There is no fixed period of time which must elapse in order for the rule of prescription to operate in vesting title and ownership to land in one State or nation.

A period of fifty years of uninterrupted possession,[154] another period of "over 70 years" and of "nearly 100 years,"[155] and again a period of "over 85 years, embracing nearly the lives of three generations" were sufficient for the application of this principle.[156]

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[152]To the same effect see 1 *Moore, International Law Digest* (1906), p. 296.

[153]*Missouri v. Illinois* (1906), 200 U. S. 496, 520.

[154]Rule A, Art. IV, of the treaty between Great Briain and Venezuela, February 2, 1897, to settle the boundary between British Guiana and Venezuela, set forth in 1 *Moore, "International Law Digest"* (1906), p. 297; *Lauterpacht, "Private Law Sources and Analogies of International Law"* (1927), p. 229.

[155]*Indiana v. Kentucky* (1890), 136 U. S. 479, 509, 518.

[156]*Virginia v. Tennessee* (1893), 148 U. S. 503, 524.

There can be no arbitrary time limit for the period of prescription and "each case should be left to depend upon its own facts."[157]

3. Character of Evidence Required:

The acts, conduct and transactions which are taken into consideration on this issue involve such proofs as publicity, continued occupation by the State of a part at least of the territory, absence of interruption, employment of labor and capital, assessment and collection of real property taxes upon a part at least of the land, and the absence of any attempt to exercise proprietary rights during the period of prescription by the State or sovereign now attacking the title by prescription.[158]

4. Rule of Constructive Possession:

The rule of constructive possession, as a part of the law of prescription or adverse possession governing between States and nations, has been expressly adopted and applied by this Court.[159]

By this rule, where it is shown that the State exercises ownership, sovereignty and jurisdiction over a part of the territory in question, under claim of title to the entire ter-

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[157] 1 *Moore, "International Law Digest"* (1906), p. 296. *Maryland v. West Virginia* (1910), 217 U. S. 1, 44.
Oppenheim, "International Law" (McNair's 4th Ed. 1928), p. 470.

[158] 1 *Moore, "International Law Digest,"* pp. 296-297. See *Maryland v. West Virginia* (1910), 217 U. S. 1, 41; *Virginia v. Tennessee* (1893), 148 U. S. 503, 522; *Indiana v. Kentucky* (1890), 136 U. S. 479, 510; *Louisiana v. Mississippi* (1906), 202 U. S. 1, 53; *Michigan v. Wisconsin* (1926), 270 U. S. 295, 307-308, 313-318; *Massachusetts v. New York* (1926), 271 U. S. 65, 95; *New Mexico v. Texas* (1927), 275 U. S. 279, 295, 298, 300 (holding principle applied as against the United States while it held New Mexico as a territory); *Vermont v. New Hampshire* (1933), 289 U. S. 593, 613; *Arkansas v. Tennessee* (1940), 310 U. S. 563, 568-571.

[159] *Michigan v. Wisconsin* (1926), 270 U. S. 295, 313-318.

ritory, such state is held to acquire title to the entire territory, by prescription, on the ground that the actual possession of a part of the larger territory or body of land is deemed to be constructive possession of the entire territory or body of land.

B. Acts Establishing California's Prescriptive Title.

The facts before the Court establish all the elements bringing this case within the rule of prescription vesting in the State title to all the submerged lands in controversy in this proceeding. (The details of these facts and the comments of counsel for plaintiff thereon are set forth in Appendix F hereto.)

A summary of this evidence will suffice at this point:

1. Legislative and Constitutional Declaration of State's Ownership.

The California Legislature has declared the State's ownership in a number of statutes, extending over the last ninety years, the first one being in 1858. An 1872 enactment declares the State to be the owner of all lands within the State underlying tide water below ordinary high water mark. The 1879 Constitution prohibits the grant or sale of submerged lands within two miles of any city. In fifteen separate enactments extending over the years from 1911 to 1943 the State declared itself to be the owner of the submerged lands within the three-mile belt of the Pacific Ocean. Typical of these is a 1911 statute declaring that

> "Whereas, Since the admission of California into the Union . . . all lands lying beneath the navigable waters of the State have been and now are

held in trust by the State for the benefit of all the inhabitants thereof . . . ."

Similar declarations of the State's ownership of the submerged lands along the coast of California have been made in many decisions by the California courts.

2. Grants by State to Coastal Municipalities of Large Portions of Three-mile Belt.

Commencing in 1911 and running through 1943, the State Legislature enacted more than fifteen statutes granting to the several coastal municipalities and counties the submerged lands under the Pacific Ocean lying in front of these cities and counties, in many instances extending to the State's three-mile boundary. About 200 of the 3000 square miles involved in this proceeding are covered by these grants to coastal cities and counties. Furthermore, the Legislature made more than ten additional grants of tide and submerged lands to other municipalities and counties lying in bays and harbors. A map showing the locations of these legislative grants to coastal municipalities in the Southern California area is set opposite this page.

3. Construction of Piers, Wharves and Breakwaters.

Substantial portions of the submerged lands in the Pacific Ocean have been occupied and used over a period of the last ninety years in the construction, operation and maintenance of many piers, wharves, groins, breakwaters and similar structures by numerous persons, corporations, and political entities acting under licenses issued pursuant to public Acts of the California Legislature. In 1858 an Act was passed authorizing the Boards of Supervisors of

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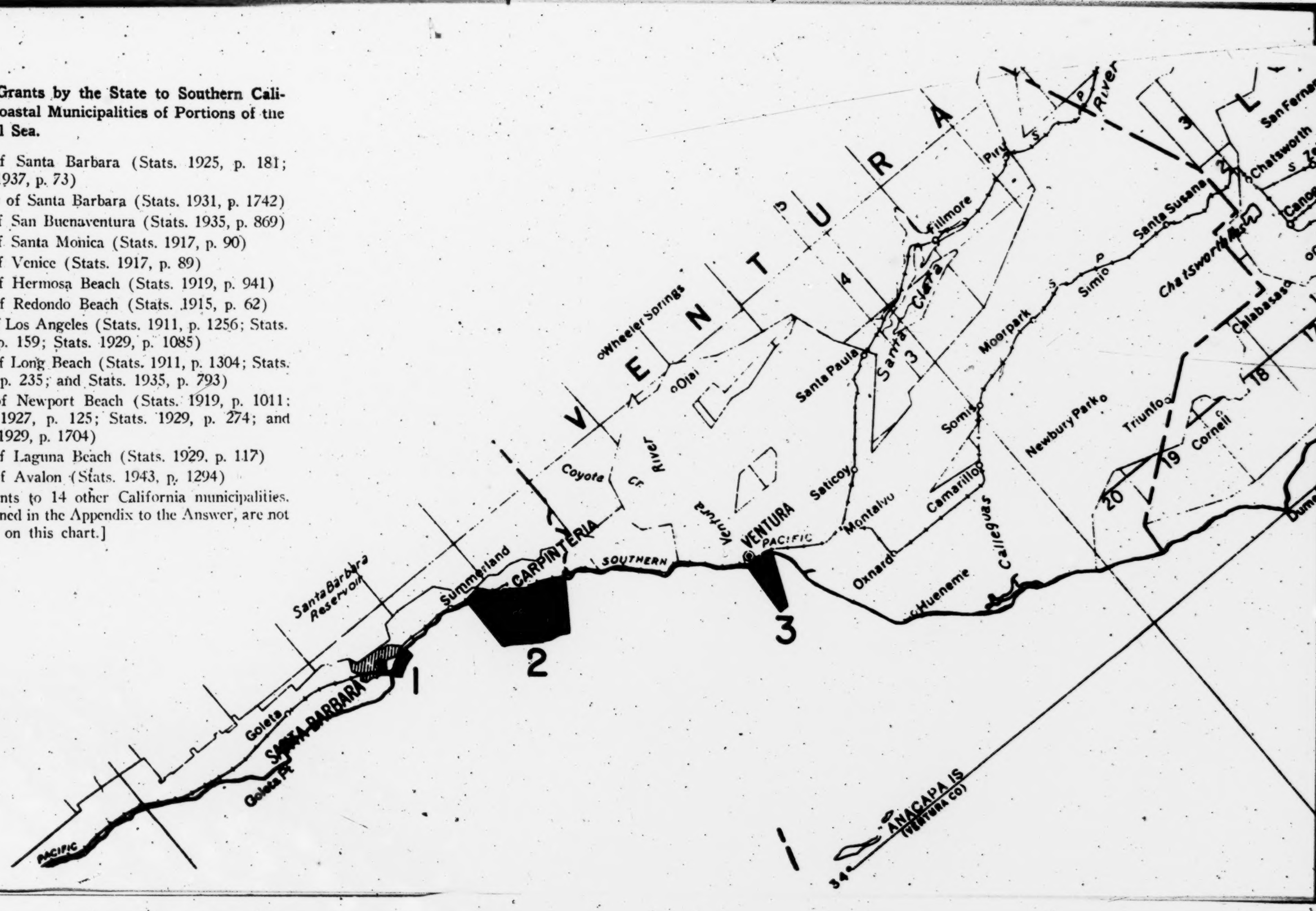
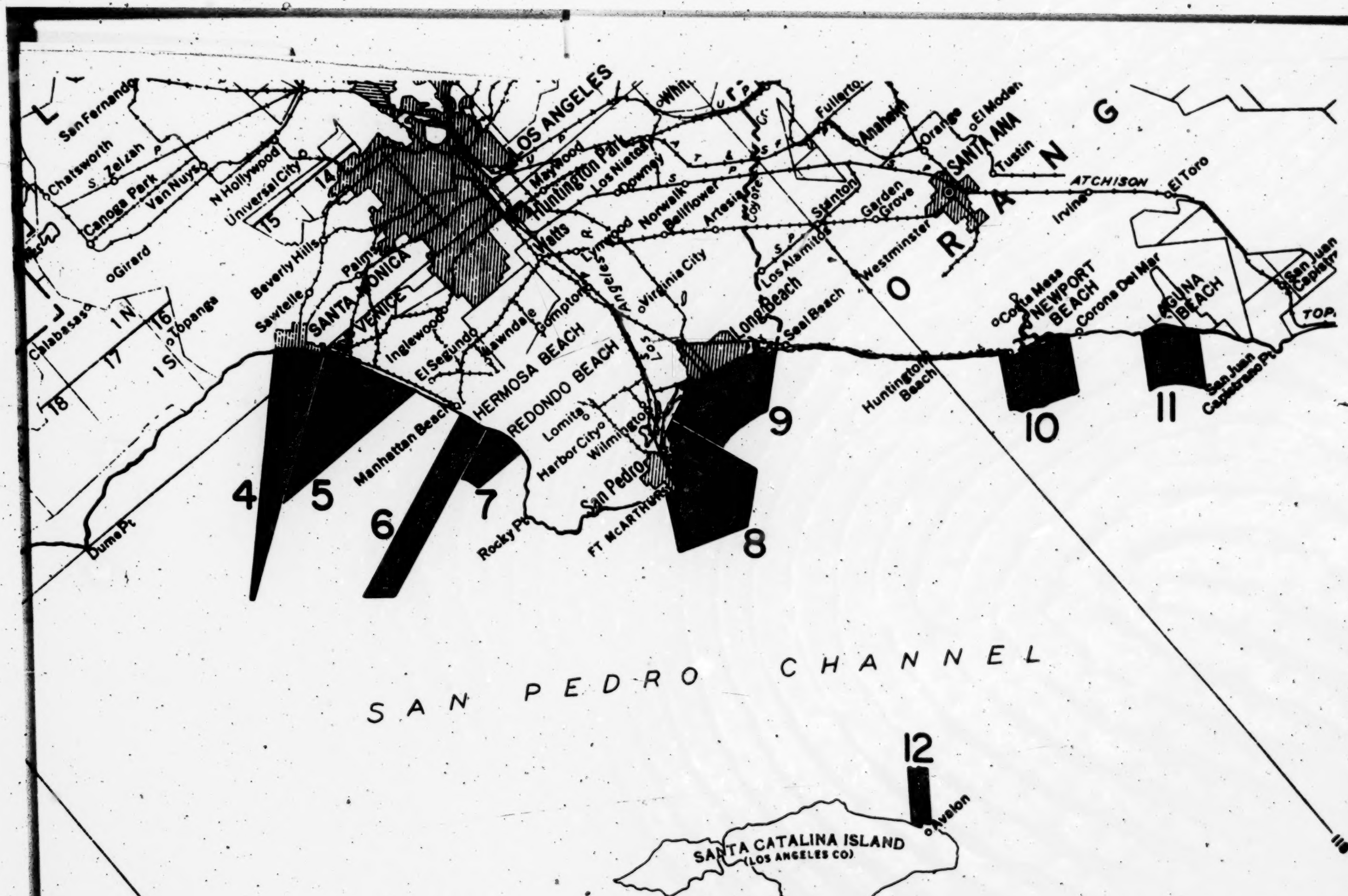
Legislative Grants by the State to Southern California Coastal Municipalities of Portions of the Marginal Sea.

(1) City of Santa Barbara (Stats. 1925, p. 181; Stats. 1937, p. 73)
(2) County of Santa Barbara (Stats. 1931, p. 1742)
(3) City of San Buenaventura (Stats. 1935, p. 869)
(4) City of Santa Monica (Stats. 1917, p. 90)
(5) City of Venice (Stats. 1917, p. 89)
(6) City of Hermosa Beach (Stats. 1919, p. 941)
(7) City of Redondo Beach (Stats. 1915, p. 62)
(8) City of Los Angeles (Stats. 1911, p. 1256; Stats. 1917, p. 159; Stats. 1929, p. 1085)
(9) City of Long Beach (Stats. 1911, p. 1304; Stats. 1925, p. 235; and Stats. 1935, p. 793)
(10) City of Newport Beach (Stats. 1919, p. 1011; Stats 1927, p. 125; Stats. 1929, p. 274; and Stats. 1929, p. 1704)
(11) City of Laguna Beach (Stats. 1929, p. 117)
(12) City of Avalon (Stats. 1943, p. 1294)

[Similar grants to 14 other California municipalities, mentioned in the Appendix to the Answer, are not shown on this chart.]




LOS ANGELES
ORANGE
SAN PEDRO CHANNEL
SANTA CATALINA ISLAND
(LOS ANGELES CO)
San Fernando
Chatsworth
Canoga Park
Van Nuys
N Hollywood
Universal City
Beverly Hills
Girard
Sawtelle
Palms
SANTA MONICA
VENICE
Topanga
Chalabasas
Dume Pt
Inglewood
El Segundo
Hawndale
Gompton
HERMOSA BEACH
REDONDO BEACH
Manhattan Beach
Lomita
Harbor City
Wilmington
San Pedro
Rocky Pt
FT McARTHUR
Watts
Lynwood
Norwalk
Bellflower
Downey
Los Nietos
Maywood
Huntington Park
Whittier
Fullerton
Anaheim
Orange
El Modena
SANTA ANA
Tustin
Artesia
Coyote
Stanton
Garden Grove
Westminster
Los Alamitos
Virginia City
Long Beach
Seal Beach
Huntington Beach
ATCHISON
Irvine
El Toro
Costa Mesa
NEWPORT BEACH
Corona Del Mar
LAGUNA BEACH
San Juan Capistrano
San Juan Capistrano Pt
TOR
Avalon
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coastal counties to grant franchises to California citizens to construct wharves, chutes and piers

"on the submerged lands of this State."

Pursuant thereto, large numbers of franchises have been issued and improvements constructed thereon extending into the Pacific Ocean distances up to three-fifths of a mile.

4. Construction of Groins, Jetties and Sea Walls.

Many groins, jetties and sea walls and other similar improvements have been constructed and are now maintained in the Pacific Ocean by numerous citizens of California under permits granted by the State Lands Commission pursuant to a 1931 Act of the California Legislature authorizing the issuance of such permits

> "upon, across or over any of the . . . tide or submerged lands of this State bordering upon such littoral lands."

5. Oil and Gas Leases of Submerged Lands.

In 1921 the State Legislature enacted an offshore oil leasing statute. In that same year, the State received many applications and within a few months issued a number of leases in the Summerland offshore oil field in the Pacific Ocean.[160]

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[160]This is contrary to the erroneous assertion of counsel for plaintiff that

"it was not until some years"

after the enactment of this 1921 statute before the State undertook generally to issue leases under this Act. Plaintiff's Brief, pp. 186-187.

Over 100 leases and permits have been granted by the State to its residents under this 1921 Act, as amended from time to time, covering six or more separate offshore oil fields. These leases cover substantial portions (approximately 15 square miles) of the submerged lands lying in the Pacific Ocean extending out distances of approximately one-half mile into the ocean.

A map showing the locations of these offshore oil fields leased under the 1921 Act, as amended, is set opposite this page.

More than 350 wells under the ocean have been drilled pursuant to this 1921 Act and its amendments. Enormous sums of money have been expended by the lessees and permittees of the State in making improvements and drilling these wells.

In practically every biennial legislative session since the 1921 statute, the California Legislature has enacted legislation amendatory of or supplemental to the 1921 Act.

6. Assessment and Collection of Taxes on Submerged Lands.

The several coastal counties of the State in which are located submerged land oil fields have for many years assessed and collected taxes upon the mineral interests in and under the submerged lands in the Pacific Ocean covered by State oil and gas leases.

7. Fishing Industry.

Ever since its formation as a State, California has exercised its right of ownership and control over the

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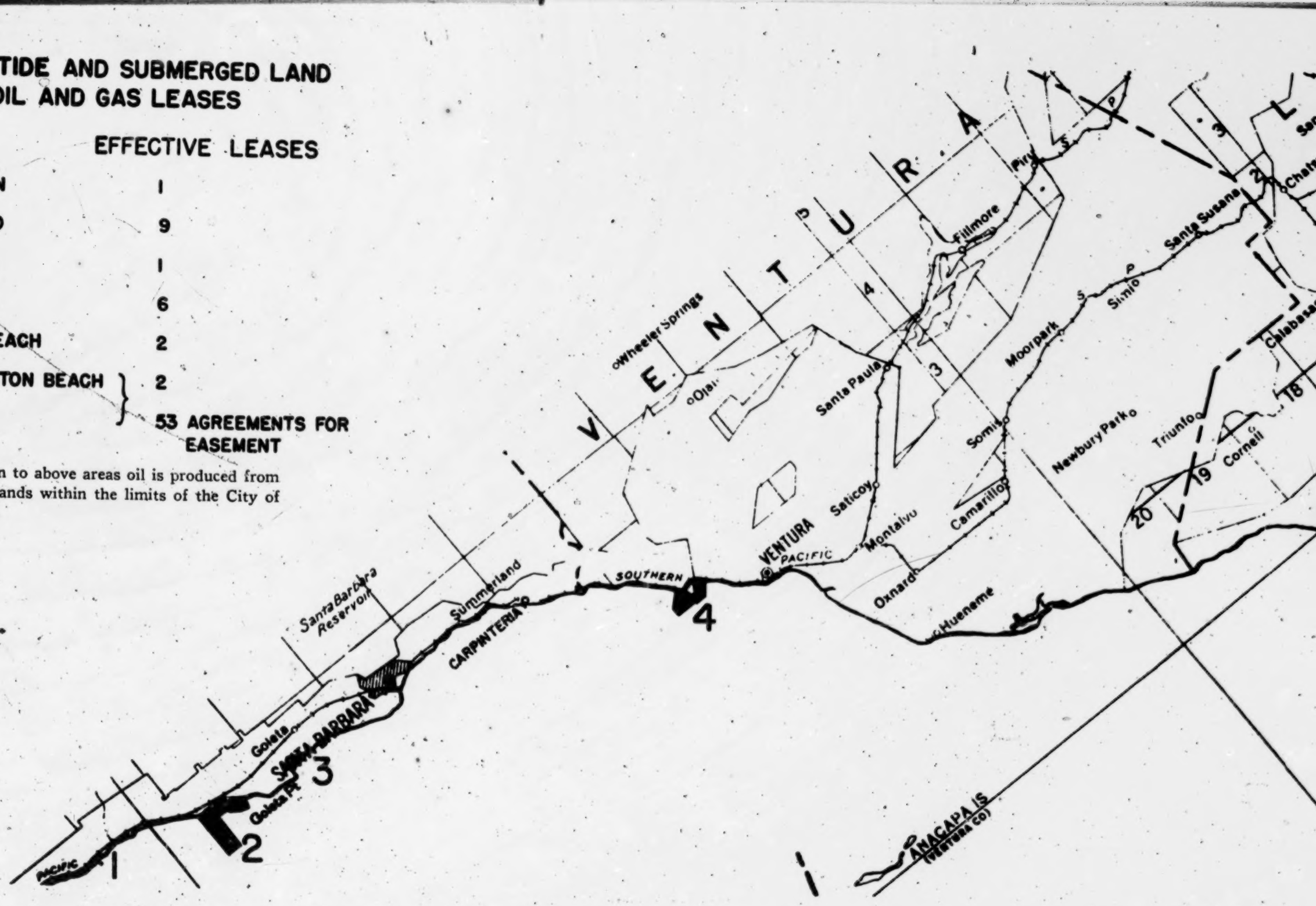
STATE TIDE AND SUBMERGED LAND OIL AND GAS LEASES

FIELD	EFFECTIVE LEASES
1. CAPITAN	1
2. ELWOOD	9
3. GOLETA	1
4. RINCON	6
5. SEAL BEACH	2
6. HUNTINGTON BEACH	2
	53 AGREEMENTS FOR EASEMENT

In addition to above areas oil is produced from submerged lands within the limits of the City of Long Beach.



San Fernando
Chatsworth
Zelzah
Canoga Park
Van Nuys
N Hollywood
Universal City
Girard
Beverly Hills
Palms
Sawtelle
Chalbasas
Topanga
Cornell
Dume Pt
SANTA MONICA
VENICE
Inglewood
El Segundo
Hawndale
Compton
Manhattan Beach
HERMOSA BEACH
REDONDO BEACH
Rocky Pt
Lomita
Harbor City
Wilmington
San Pedro
FT McARTHUR
Maywood
Huntington Park
Los Nietos
Downey
Watts
Lynwood
Norwalk
Bellflower
Artesia
Virginia City
Los Alamitos
Long Beach
Seal Beach
Fullerton
Anaheim
Orange
El Modena
SANTA ANA
Tustin
Stanton
Garden Grove
Westminster
ATCHISON
Irvine
El Toro
Costa Mesa
Corona Del Mar
NEWPORT BEACH
LAGUNA BEACH
San Juan Capistrano Pt
Huntington Beach
L
H
J
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1S
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18
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6
O R A N G

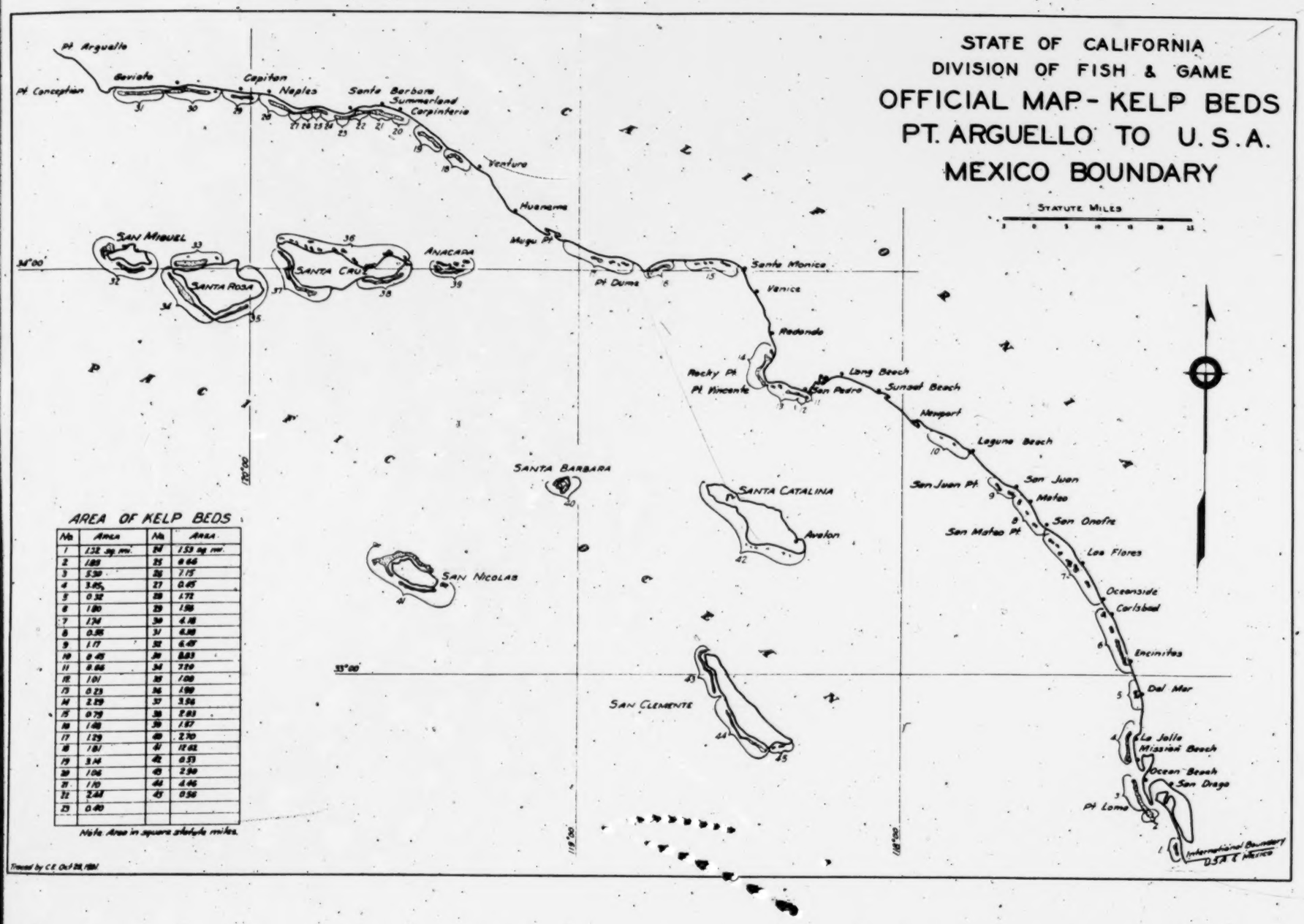
SAN PEDRO CHANNEL

SANTA CATALINA ISLAND
LOS ANGELES CO.
Avalon

STATE OF CALIFORNIA
DIVISION OF FISH & GAME

OFFICIAL MAP - KELP BEDS
PT. ARGUELLO TO U.S.A. MEXICO BOUNDARY

STATUTE MILES



AREA OF KELP BEDS

No.	Area	No.	Area
1	1.38 sq. mi.	24	1.53 sq. mi.
2	1.89	25	0.66
3	5.30	26	7.15
4	3.85	27	0.45
5	0.32	28	1.72
6	1.80	29	1.96
7	1.74	30	4.18
8	0.38	31	6.38
9	1.17	32	6.47
10	0.45	34	8.83
11	9.66	34	7.39
12	1.01	35	1.08
13	0.23	36	1.90
14	2.29	37	3.56
15	0.79	38	7.83
16	1.48	39	1.87
17	1.29	40	2.70
18	1.81	41	12.62
19	3.14	42	0.53
20	1.06	43	2.90
21	1.10	44	4.46
22	2.48	45	0.56
23	0.40		

Note: Area in square statute miles.

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fish in the coastal waters of California. The Legislature has on several occasions declared the State to be the owner of all the fish found within the waters of the State. For example, in 1917 the Legislature declared that

> "the ownership and title to all fish found in the waters under the jurisdiction of the State are in the State of California."

A vast amount of legislation regulating and controlling the State-owned fishery rights in the three-mile belt are found in the California statute books. There are many Court decisions interpreting and enforcing these fishery statutes and declaring the State to be the owner of these fishery rights.

8. Leasing of Kelp Beds in Three-mile Belt.

In 1917 the Legislature passed a statute asserting the State's ownership and providing for leasing the kelp beds in the State waters. Under this statute, 45 kelp beds aggregating approximately 100 square miles in the coastal waters of Southern California have been leased or offered for lease. A copy of a 1931 map prepared by the State Fish and Game Commission under this 1917 Act is set opposite this page.

Since 1917, a large tonnage of kelp has been harvested annually from the State kelp beds in the Pacific Ocean and rentals paid to the State therefor.

9. State and County Boundaries Cover Entire Three-mile Belt.

The State's jurisdiction and sovereignty has been exercised by the 1849 and 1879 Constitutions fixing the boundary at three English miles[161] into the Pacific Ocean, including all islands, harbors, and bays along and adjacent to the coast.

The Legislature in 1872 fixed the coastal county boundaries as extending out to the three-mile limit.

10. Expenditure of Capital and Labor by State and Its Grantees, Lessees and Licensees.

Large expenditures have been made over a period of many years by the State and its citizens acting under State authority in making improvements in and upon the submerged lands of the Pacific Ocean. The municipal

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[161]Plaintiff makes a big point (Br. pp. 20, 81-82) over the use of the term "three English miles" in the California Constitution. The point is not only irrelevant but plaintiff's conclusions are erroneous. The California Supreme Court has definitely ruled that the boundaries of Californa extend *three nautical miles* from the coast. *Ocean Industries, Inc. v. Superior Court,* 200 Cal. 235, 245 (1921). The interpretation of the State Constitution by the court of the State is always accepted by this Court.

The interpretation of the California court is supported by other authorities. The phrase "English mile" is not synonymous with "English statute mile." It may equally well be used to mean an "English nautical mile." It is a general rule of law that "unless otherwise specifically specified . . . distances on water refer to nautical rather than land miles." *Buttimer v. Detroit etc. Co.,* 39 F. Supp. 222, 227; *Webster v. Detroit, etc. Co.,* 131 F. (2d) 222. The phrase "English mile" has no fixed statutory meaning and had none either in England or America in 1849. Hence, it must be construed in relation to the subject matter, namely the measurement of a water area. See *Lazell v. Boardman,* 69 Atl. 97, 99 (1907 Maine).

grantees of the submerged lands received from the State, have made vast improvements, constructed man-made harbors, breakwaters, piers, and other improvements in and upon portions of the marginal sea. One example among many others is the City of Santa Barbara which in 1925 received a grant of the tide and submerged lands in the Pacific Ocean lying in front of the City. The next year Santa Barbara constructed a breakwater extending into the ocean as a protection for its open roadstead. Its taxpayers expended approximately $750,000 in the construction of that breakwater.

There are many other examples of substantial expenditures by the State, its municipal and county grantees and its other lessees and licensees.

11. Nonassertion of Claim of Ownership by United States for 95 Years.

The United States has made no attempt to assert any claim of ownership to the submerged lands in controversy from 1850 until the year 1945. This nonassertion of ownership was not a mere oversight but was the result of a deliberate and intentional policy adopted by the United States and its Congress. The Department of the Interior for more than four decades ruled consistently that the State of California owned the submerged lands in controversy. The United States Attorney General's Office and other branches and departments of the United States have ruled and declared that California is the owner of the submerged lands in controversy.

C. Law and Facts Show Clear Prescriptive Title in State of California.

All elements required by the decisions of this Court to establish title in a State by prescription are present in this case:

(i) *Public assertion of ownership*—California has consistently done this in its Constitution, through its Legislature, and by its courts, for about 90 years.

(ii) *Actual occupation, possession and use of substantial portions of the lands in question*—the State, its grantees, lessees and licensees, have occupied, possessed and used very large portions—*over 10% of the 3,000 square miles*—of the submerged lands in the 3-mile belt

(a) By the State granting substantial portions of the 3-mile belt to the coastal cities;

(b) By the building of wharves, piers, breakwaters, groins, sea-walls and jetties;

(c) By the drilling into and upon the submerged lands as far out as one mile and the discovery and development of oil and gas in six submerged land oil fields;

(d) By assessing and collecting taxes upon interests in and to the submerged lands;

(e) By regulation and control of the fish and fisheries owned by the State upon the basis of the ownership of the submerged lands; and

(f) By leasing areas in the Pacific Ocean for kelp harvesting.

(iii) *Actual expenditures of capital and labor in and upon the lands in question*—the State, its grantees, lessees

and licensees, have expended enormous sums in developing and improving substantial portions of the submerged lands in controversy.

(iv) *Nonassertion of any claim of ownership by the United States*—for a period of approximately 95 years the United States of America has failed to assert any ownership, and in fact it has officially on numerous occasions ruled that California was the owner.

(iv) *Constructive Possession of whole belt based on actual possession of part*—the actual possession of substantial portions of these submerged lands, under claim of ownership of all such lands within the State boundaries, amounts to constructive possession of the entire submerged lands and gives the State title by prescription to all submerged lands within its boundaries. (*Michigan v. Wisconsin* (1926), 270 U. S. 295, 313-318.)

Thus the title of the State of California to all submerged lands in controversy is established beyond any possible doubt on this entirely independent principle of prescription whereby long-continued and undisturbed possession of land under claim of ownership attains the status of absolute title.

VII.

ACQUIESCENCE.

(Second Affirmative Defense)

The rule developed in this brief that California owns the marginal sea off her coast has been fully recognized and acquiesced in by all branches and many departments of the United States for a period of about 100 years.

Such acquiescence and recognition in and of itself establish that title to the submerged lands is vested in the State of California under an independent principle and rule of law.

A. Rule of Law.

Long acquiescence in the exercise by a State of dominion, jurisdiction and ownership over territory—land or water area—is conclusive of the State's title and rightful authority over such territory.

> "This long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the State of Kentucky, such omission to take any steps to assert her present claim by the State of Indiana, can only be regarded as recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof. *It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of domin-*

> *ion and sovereignty over it, is conclusive of the nation's title* and rightful authority."[162]

This rule of acquiescence has been held by this Court to bind the United States as well as a State.

> ". . . this conclusion is reinforced by the tacit and long-continued acquiescence of the United States, while New Mexico was a territory, in the claims of those holding the land in controversy under Texas surveys and patents, and the undisturbed possession of the Texas claimants."[163]

Plaintiff's Brief contains no reference to this rule of acquiescence or to the cases supporting it. Counsel appear to have studiously avoided any mention of it. In more than one instance counsel have carefully described plaintiff's version of the defenses set out in the State's Answer as

> "estoppel or some related doctrine, laches, adverse possession, and res judicata."[164]

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[162] *Indiana v. Kentucky* (1890), 136 U. S. 479, 510-512; see also: *Virginia v. Tennessee* (1893), 148 U. S. 503, 522-523; *Louisiana v. Mississippi* (1906), 202 U. S. 1, 53-54; *Michigan v. Wisconsin* (1926), 270 U. S. 295, 308; *Massachusetts v. New York* (1926), 271 U. S. 65, 95-96; *Oklahoma v. Texas* (1925), 272 U. S. 21, 44, 46-48; *Arkansas v. Tennessee* (1940), 310 U. S. 563, 568-571, *Rhode Island v. Massachusetts* (1846), 45 U. S. (4 How.) 590, 638.

[163] *New Mexico v. Texas* (1927), 275 U. S. 279, 300; see also: *United States v. Texas* (1895), 162 U. S. 1, 60-61; *United States v. Midwest Oil Company* (1915), 236 U. S. 459, 472-475; *Buford v. Houtz* (1889), 133 U. S. 320, 326; *Atchison v. Peterson* (1874), 87 U. S. (20 Wallace) 507, 512; *Sparrow v. Strong* (1865), 70 U. S. (3 Wallace) 97, 104; *United States v. Stone* (1864), 69 U. S. 525, 537.

[164] Plaintiff's Brief, pages 12; 163; 14; 164; 197; 198.

B. Facts Establishing Acquiescence and Recognition by the United States in State's Dominion, Sovereignty and Ownership of Submerged Lands.

The facts before the Court under judicial notice establish that the United States has always, until quite recently, recognized and acquiesced in California's ownership of the submerged lands in question.

We will merely summarize these facts. (The details of these facts, the comments of counsel for plaintiff, and our replies thereto, are set forth in Appendix G hereto.)

(I)
Policy of Congress.

Congress has always refrained from any attempt to exercise ownership over or dispose of the navigable waters and soils thereunder in the respective States. It has never extended its public land surveys beyond ordinary high water mark bordering navigable waters whether "inland" or on the open coast. This policy has been commented on by the Court on numerous occasions.[165]

An affirmative declaration of this policy of Congress is found in the Act of May 14, 1898, relative to the Territory of Alaska where Congress declared that nothing should impair

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[165]In *United States v. Holt State Bank* (1926), 270 U. S. 49, 55, the Court states that:

> ". . . the United States early adopted and constantly has adhered to the policy of regarding the *lands under navigable waters* in acquired territory, while under its sole dominion, as held for the ultimate benefit of future states, and so has refrained from making any disposal thereof, save in exceptional instances. . . ."

Shively v. Bowlby (1894), 152 U. S. 1, 43, 48—"settled policy"; *Mann v. Tacoma Land Company* (1894), 153 U. S. 273, 284—"the whole policy."

> "the *title of any State* that may hereafter be erected out of said district, . . . to tide lands and *beds of any of its navigable waters* . . . . The term 'navigable waters' . . . shall be held to include all tidal waters up to the line of ordinary high tide . . ."

In 1889, Congress admitted Washington into the Union upon the issuance by the President of the United States of a proclamation approving the State Constitution presented to Congress. The President duly approved Washington's Constitution defining its boundary as extending "one marine league" into the Ocean, and declaring that the State

> "asserts its ownership to the beds and shores of all navigable waters in the state . . ."

In 1911, the Department of Agriculture reported to Congress the important kelp bed resources in the marginal sea along the California coast and their availability for the development of potassium chloride worth annually at least $35,000,000 together with an iodine by-product. The report recommended that Congress give immediate attention to the question of supervising, leasing and policing these kelp groves. However, the report contained a legal opinion of the Solicitor of the Department of Agriculture *that the State and not the Federal Government had the right to regulate the taking of kelp within the three-mile limit.* Congress made several appropriations from 1910 to 1923 for experimental work in connection with commercial use of kelp. Hpwever, Congress never enacted any legislation for the leasing, regulation or policing of these kelp groves. On the other hand, the California and Oregon Legislatures in 1917 enacted kelp bed leasing laws, which were reported to Congress prior to 1917 when these States

proposed the enactment thereof. A map showing more than 100 square miles of kelp bed areas leased and subject to lease by the State of California is set forth in the chapter on "Prescription," (*supra,* p. 147).

In the last 25 years California has enacted a series of laws for State leasing and regulation of oil development under the bed of its three-mile belt. On the other hand, Congress has always refrained from enacting any such legislation, despite its attention having been called on several occasions to the California offshore oil operations under State legislation. In 1907, the Department of the Interior published a report under Congressional approriation of the Summerland offshore oil field in Santa Barbara County, California. In 1938 and 1939 Congress was fully advised of the offshore oil production under State leases and the offshore oil production program of the City of Long Beach, as grantee of the State of all submerged lands within its city boundaries. Nevertheless, Congress refused to adopt any resolution changing its long-established policy. Other coastal States for years have had laws authorizing oil leases of submerged lands in the marginal sea: Louisiana since 1910, Texas since 1913, Mississippi since 1932, North Carolina since 1937, and Alabama since 1943. Many oil and gas leases have been executed by these States covering substantial portions of the bed of the marginal sea.

As discussed *supra*, pp. 101-105, in *The Abby Dodge*, 223 U. S. 166, this Court, in 1912, held that the *taking of sponges* from the marginal sea within the boundaries of

Florida was not the subject of Congressional action because Florida owned the bed of its marginal sea and the sponges growing thereon. In 1914, Congress amended its sponge industry legislation to conform with the decision in the *Abby Dodge,* so as to regulate the taking of sponges in the Gulf of Mexico or Straits of Florida *only*

"outside of State territorial limits."

From colonial times, the *right of fishery* in the marginal sea has been regulated by the colonies and the States based on State ownership of the bed of the marginal sea and the right of fishery therein, as this Court has declared on a number of occasions. Congress has never passed any legislation asserting ownership, control or regulation of the right of fishery in coastal waters of any of the States, except for two or three treaties which have been entered into with foreign nations requiring implementation by Acts of Congress.

Congress has never changed its policy of recognizing State ownership of submerged lands in coastal waters as well as in "inland waters." By affirmative action of the 79th Congress, a joint resolution declaring the States' ownership of the submerged lands in question was adopted by a majority of both Houses, although vetoed by the President on August 1, 1946.

The comments of counsel for plaintiff on this policy of Congress are discussed, and the details of and citations to the data establishing this affirmative policy of Congress, are set forth in Appendix G to this Brief.

(II)

Grants of Submerged Lands to the United States From the State of California.

Plaintiff concedes[166] that 36 of the grants from California and the other coastal States to the United States, set forth in the Appendix to Answer, involve lands under the "open sea," or involve lands of which plaintiff is "doubtful" as to whether they are located in the "open sea" or in "inland waters." Actually, we believe there are about 50 rather than 36 transactions in these two categories.

We will summarize only these 50 grants. (The details are set forth in Appendix G to this Brief. Likewise the arguments and comments of counsel for plaintiff concerning these grants are reviewed in said Appendix G.)

1. From the State of California.

The United States, through its Chief of Engineers of the War Department, approved by the Judge Advocate General of the Army, requested the California Legislature to, and on March 9, 1897 California did, grant to the United States 17 parcels of submerged lands 300 yards wide below low water mark adjacent to United States military reservations. The War Department prepared and filed with the California Surveyor General 17 maps depicting 17 areas of submerged lands granted under this Act.

Plaintiff concedes that three of these 17 grants are situated in the "open sea."[167] The one at Point Loma,

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[166]Plaintiff's Brief, pages 167-169.

[167]Plaintiff's Brief, page 172.

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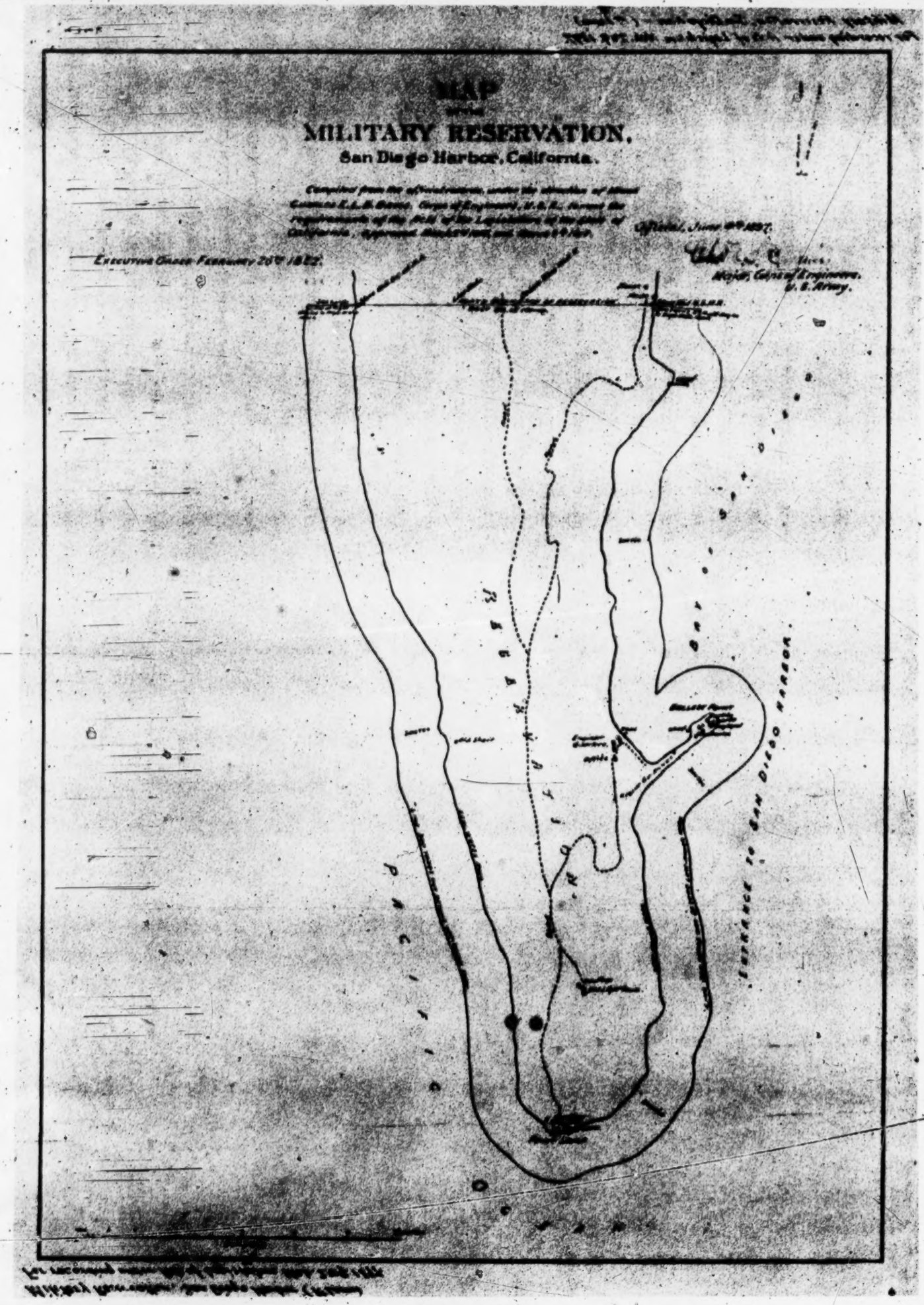
MAP
MILITARY RESERVATION,
San Diego Harbor, California.
Executive Order February 20th 1852.
Major, Corps of Engineers,
U. S. Army.
RESERVATION
PACIFIC OCEAN
ENTRANCE TO SAN DIEGO HARBOR.

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San Diego, is *in excess of 330 acres* of submerged lands under the "open sea," and is depicted on the map opposite this page.

The second, Zuninga Shoal, is *approximately 60 acres* in the "open sea." The third at Lime Point Tract is *over 100 acres* of submerged lands in the "open sea." A fourth of these 17 grants which probably should be classified as "open sea" is at the Presidio at San Francisco and is *over 100 acres* of submerged lands. There are two more of these 17 grants under the 1897 Act which plaintiff classifies in its "doubtful" column, being the Deadman's Island and the Fort MacArthur Military Reservation grants lying in the Bay of San Pedro. Plaintiff's "doubt" as to these two grants is based on plaintiff's uncertainty as to whether it claims ownership of that area because it is unable to say whether the Bay of San Pedro constitutes "open sea" under plaintiff's theory, or is a part of the "inland waters."

The other 11 grants under the 1897 Act each involve submerged lands lying within San Francisco Bay, Monterey Bay or San Diego Bay, and are significant as showing the uniformity of treatment of submerged lands whether in bays or in the "open sea."

In 1931 the California Legislature passed a statute, at the request of the United States through its Navy Department, authorizing the conveyance to the United States, and in 1934 a grant deed was executed conveying to plaintiff, *submerged lands situated in the open Pacific Ocean* adjoining North Island, Coronado Beach.

In 1941, at the request of the United States through its War Department, the California Legislature passed a statute authorizing the conveyance to the United States, and a deed conveying such interest was executed and delivered, of *a 32-acre parcel* of submerged lands lying in the "open sea" adjoining Coronado Beach.

In 1941, at the request of the United States through its War Department, the State of California executed two easements covering a 1-acre parcel and a 2-acre parcel of submerged lands lying in the open Pacific Ocean off of Santa Catalina Island for the use of a company under contract with the War Department to construct an extension to the Los Angeles-Long Beach breakwater. This transaction is classified by plaintiff as being in the "open sea."

In 1943, the State of California executed an easement to the agent of Defense Plant Corporation (a wholly owned corporation of the United States), of an area of submerged lands extending below low water mark in the Pacific Ocean and Bay of Santa Monica at El Segundo, with the title to this easement vesting in Defense Plant Corporation and the consideration therefor being paid out of Government funds. Plaintiff classifies this in its "doubtful" column, as plaintiff is uncertain whether Santa Monica Bay is "open sea" or "inland waters."

A number of other grants have been made by the State of California to the United States of submerged lands. While most of them lie within bays or harbors, they demonstrate the uniformity of treatment of submerged lands whether located in bays and harbors or under the marginal sea.

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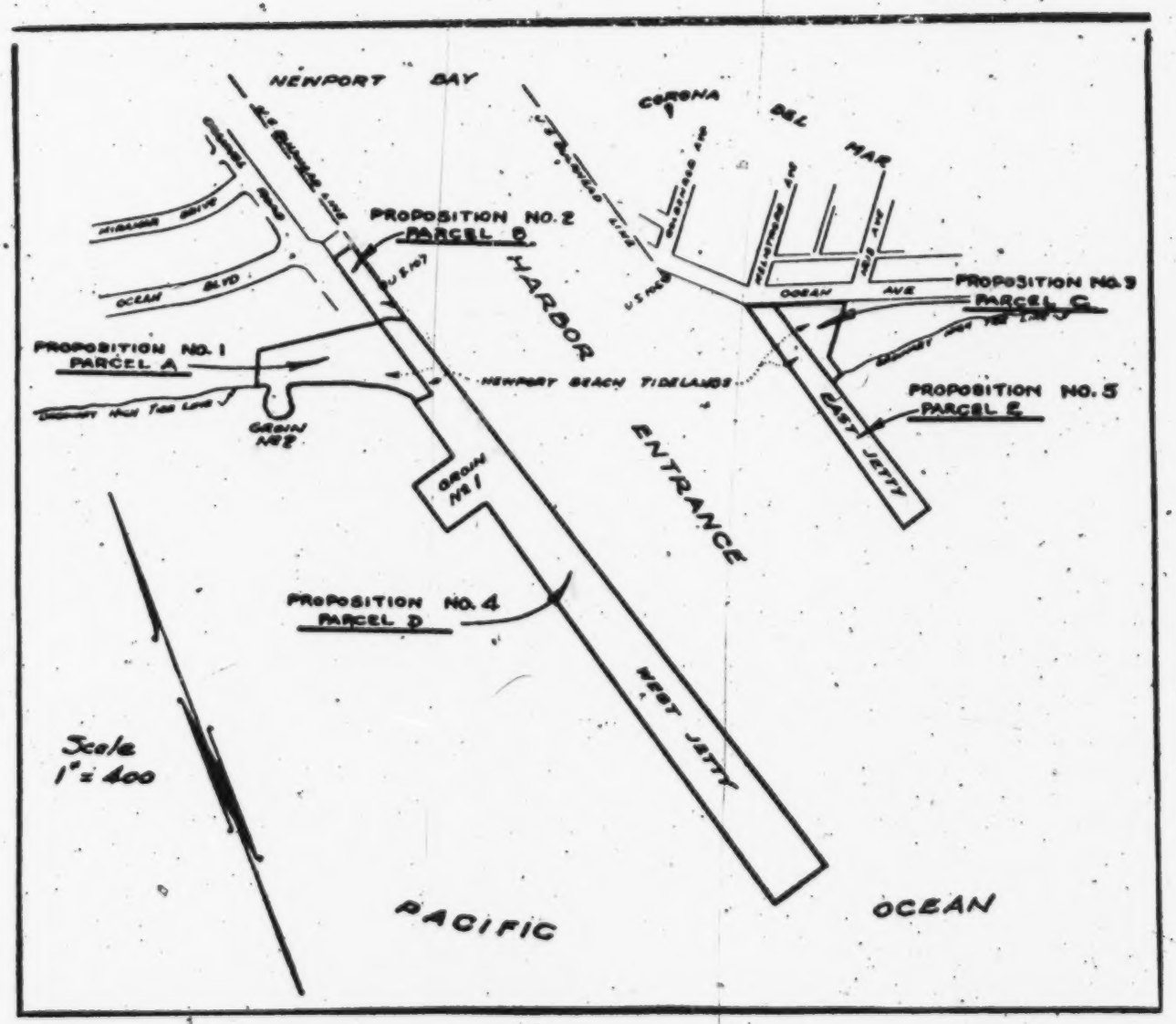
NEWPORT BAY
U.S. BULKHEAD LINE
U.S. PIERHEAD LINE
CORONA DEL MAR
HIGHLAND DRIVE
OCEAN BLVD
PROPOSITION NO. 2
PARCEL B
HARBOR
ENTRANCE
OCEAN AVE
PROPOSITION NO. 3
PARCEL C
PROPOSITION NO. 1
PARCEL A
NEWPORT BEACH TIDELANDS
PROPOSITION NO. 5
PARCEL E
EAST JETTY
GRAIN NO 2
GRAIN NO 1
PROPOSITION NO. 4
PARCEL D
WEST JETTY
Scale
1" = 400
PACIFIC
OCEAN

(III)

Grants From California Municipalities to the United States.

California has granted portions of its three-mile belt to a number of its coastal municipalities and counties, and has authorized them to convey portions thereof to the United States. Many grants, leases, licenses and easements have been executed by these municipalities to the United States covering submerged lands both in the marginal or "open" sea and in bays and harbors. Examples are:

The City of Newport Beach, in 1934, executed five warranty deeds to the United States at the latter's request, two of them conveying *11 acres of submerged lands extending in the Pacific Ocean outside of any bay or harbor approximately one-third of a mile below low water mark,* as shown on the map set opposite this page.

The City of Newport Beach in 1934 also granted to the United States a permit easement covering a portion of its submerged lands in the Pacific Ocean for the deposit of spoil resulting from dredging Newport Harbor.

The City of Long Beach has made a number of grants and leases to the United States of submerged lands lying in the Pacific Ocean and Bay of San Pedro. One of these was a lease of "Victory Pier," consisting of 30 acres of submerged lands leased to the United States in 1943, and under this lease the United States expended in excess

of $3,100,000 for making improvements thereon. Each of the grants and leases from Long Beach to the United States are classified by plaintiff in the "doubtful" column, due to plaintiff's doubt as to whether the Bay of San Pedro is "open sea" or "inland waters."

The City of Los Angeles has made a number of grants to the United States of submerged lands lying in the Pacific Ocean and Bay of San Pedro. One was a 9.75-acre parcel of submerged lands adjacent to Deadman's Island conveyed in 1915. Another was a 61.98-acre parcel granted to the United States in 1927. There are eight or ten separate grants and leases from the City of Los Angeles reviewed in Appendix G to this Brief, each of which plaintiff places in the "doubtful" category.

The City of Santa Barbara made four grants or leases to the United States in 1940-1942 of submerged lands lying in the open sea, filled as a result of the construction of the Santa Barbara breakwater to protect its open roadstead. The Navy Department requested these grants and has constructed valuable improvements on the four parcels granted or leased by Santa Barbara.

There are a large number of other grants, leases, licenses and easements from the Cities of San Diego, Oakland and San Francisco to the United States of submerged lands lying within San Diego Bay or San Francisco Bay demonstrating the uniform treatment accorded to submerged lands whether located in bays or harbors or under the marginal sea.

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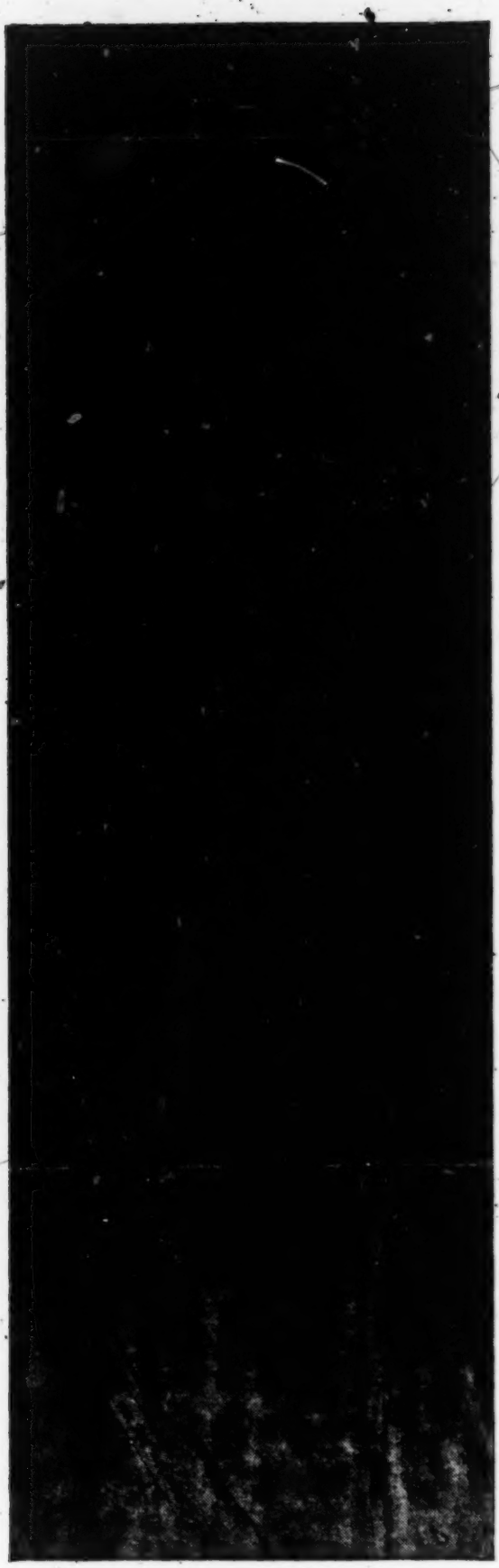

(IV)

Grants From Other Coastal States to the United States.

There have been many grants of submerged lands from the other coastal States to the United States. A number of these have been of lands under the "open sea." For example:

A 1909 Act of the Washington Legislature conveyed submerged lands out to a depth of *four fathoms of water* at low tide around United States military reservations. The United States has always, since 1909, claimed, under that Act, the ownership of submerged lands out to a depth of four fathoms of water around Fort Canby Military Reservation which is located on Cape Disappointment, the extreme northern headland in the Pacific Ocean at the mouth of the Columbia River. Plaintiff concedes this grant is situated in the Pacific Ocean and "open sea."[168]

Texas made two grants of submerged lands in the "open sea," one in 1907 on and adjoining Mustang Island extending into the Gulf of Mexico; and the other in 1912 *extending two miles into the Gulf of Mexico* for the Galveston South Jetty involving *approximately 658 acres*, much of which is submerged lands in the marginal sea, and plaintiff classifies this latter as being in the "open sea,"[169] being depicted on a map prepared by the War Department, copy of which is set opposite this page.

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[168]Plaintiff's Brief, Appendix B, page 246.

[169]Plaintiff's Brief, Appendix B, page 246.

In 1855 the Mississippi Legislature made a grant and cession to the United States relating to Ship Island lying off the Mississippi coast in the Gulf of Mexico, of a strip of submerged lands *1760 yards wide* surrounding this island. In 1940, a supplemental enactment was passed by the Mississippi Legislature relating to this 1760-yard grant. This area lies in the "open sea."

Florida has made several grants to the United States in the "open sea." One, in 1929, confirmed in 1938, conveyed approximately *450 acres* of submerged lands *extending about two miles into the Atlantic Ocean* at the mouth of the St. John's River, which plaintiff concedes is in the "open sea,"[170] and is shown on the map opposite this page.

Another Florida grant made in 1939 of an area of submerged lands *extending approximately two miles into the Gulf of Mexico,* which plaintiff concedes is in the "open sea,"[171] is depicted on the map set opposite this page.

South Carolina made five grants to the United States, from 1889 to 1916, of submerged lands extending up to 500 feet into the Atlantic Ocean outside of any bay or harbor, each of which plaintiff concedes lies in the "open sea."[172]

Delaware made several grants to the United States from 1871 to 1889, involving submerged lands extending oceanward distances of up to 3000 feet adjoining Cape Henlopen, the southerly outer headland at the entrance of Delaware Bay, and these grants are significant although

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[170]Plaintiff's Brief, page 175; Appendix B, page 248.
[171]Plaintiff's Brief, page 174; Appendix B, page 248.
[172]Plaintiff's Brief, page 172; Appendix B, page 249.

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border line cases as to whether or not located just outside the Bay.

Rhode Island has made several grants of submerged lands to the United States. One, in 1883, lies in the Atlantic Ocean at the mouth of the Seaconnet River. Another, in 1919, conveyed a 7.21-acre parcel of submerged lands adjoining the breakwater extending into the Atlantic Ocean at Great Salt Pond Harbor on Block Island, which is shown on the U. S. C. & G. S. charts as lying wholly in the marginal sea. Plaintiff classifies both these Rhode Island grants as in the "doubtful" category[173] but is certainly in error as to the 1919 one and probably so as to the earlier one.

Massachusetts in 1847 granted to the United States submerged lands on and around Minot's Rock or Ledge. Plaintiff places this grant in the "doubtful" category, stating it is in Massachusetts Bay, and that plaintiff is in doubt as to whether Massachusetts Bay is "open sea" or "inland waters,"[174] despite the headlands of this Bay lying approximately 40 miles apart and the Massachusetts statute defining a bay to exist where the headlands are not more than two marine leagues apart.

A large number of other grants have been made by the coastal and Great Lakes States to the United States of submerged lands in the marginal sea and in bays, harbors and lakes, many of them being set forth in the Appendix to the Answer. They are significant as showing the uniformity of treatment of submerged lands wherever located within State boundaries.

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[173]Plaintiff's Brief, Appendix B, pages 253-254.

[174]Plaintiff's Brief, Appendix B, page 254.

(V)

Judicial Declarations and Departmental Rulings and Acts Recognizing State Ownership of Submerged Lands.

We will summarize some of the Acts, rulings and declarations of these branches and departments of the Government. The details are set forth in Appendix G to this Brief. The comments of counsel for plaintiff are also discussed in said Appendix G.

1. By the Judiciary.

As we have previously shown in the chapter on "Rule of Property," this Court over the last 105 years has declared on more than thirty occasions that the States respectively own all the navigable waters within their boundaries. The most eminent jurists this country has produced, including every Chief Justice of the Court during this 105-year span, have made such a declaration, with the exception of one Chief Justice who concurred in the declaration on several occasions. Practically every member of the Court over this period of years, until 1935 when the last of these cases was decided, either declared the rule or concurred in an opinion containing such declaration.

2. By the United States Attorney General.

The Attorney General of the United States has been required for generations by various Acts of Congress to render his opinion on the title to all lands acquired or received by the United States. Presumably, therefore, the Attorney General has rendered a favorable opinion that title was vested in the State or its grantee in every in-

stance in which the United States has taken an instrument conveying title or rights in submerged lands either in the marginal sea or in bays or harbors. We have presented a good number of these opinions in the Appendix to the Answer. Mention of a few of them will show that the Attorney General has performed his statutory duty of rendering favorable title opinions on the various grants received by the United States. In 1927 Attorney General Mitchell rendered an opinion that title to submerged lands in the Pacific Ocean and Bay of San Pedro was vested in the City of Los Angeles, as successor to California, just as the Attorney General's Office had done in connection with a prior grant in 1915 from the City of Los Angeles of submerged lands in the Pacific Ocean and Bay of San Pedro. In 1934 the Attorney General's Office rendered an opinion that title to the submerged lands in the marginal sea outside Newport Harbor Entrance, granted to the United States by warranty deed, was vested in that City, as grantee from California. In 1934 the Attorney General advised that title was vested in California in connection with the grant of submerged lands in the open sea adjoining North Island. The Attorney General rendered opinions in 1925 in connection with the grant of submerged lands granted by the State of Washington to the United States, adjacent to Fort Canby, lying in the open sea of the Pacific Ocean. The Attorney General rendered an opinion accompanying the grant of submerged lands for a lighthouse site in the Atlantic Ocean at the mouth of the Seaconnet River, Rhode Island.

Counsel for plaintiff attempt to minimize the legal effect and importance of the opinions of their office. Counsel merely state that the State's Answer refers to "some seven title opinions rendered by the Attorney General or his subordinates" in connection with the fourteen instances of grants conceded to be in the "open sea."[175] No attempt is made to explain away these opinions, since there is no ground for doing so. Counsel ignore the fact that the State has simply presented *examples* and has made no effort to collate every last opinion rendered by counsel for plaintiff over the many decades. Counsel avoid the Acts of Congress imposing a duty upon their own office to render title opinions for all these lands. We may presume that the Attorney General's Office has performed its statutory duty and has in each instance of a submerged land grant rendered a favorable title opinion in conformity with the examples referred to above. Since these records are in the files of counsel themselves, and are peculiarly within their own control, it would seem reasonable for plaintiff to come forward with any further evidence on this subject. *It is significant that counsel do not offer a single opinion contrary to these examples.*

Indeed, counsel for plaintiff not merely ask this Court to overrule an established rule of property, but in filing this action, without specific direction from Congress, have found it necessary to reverse and overrule their own opinions rendered over the decades on this very rule of property law.

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[175]Plaintiff's Brief, page 189, note 41(a).

3. By the Secretary and Department of the Interior.

For a period of *at least 37 years* the Secretary and Department of the Interior consistently ruled that the United States does not, and that the coastal States do, own all submerged lands in the marginal sea as well as in bays and harbors. *In about 50 separate cases* involving the marginal sea, one in the year 1900, another in 1910, another in 1926, and a number between 1933 and 1937, the Secretary and Department have uniformly so ruled. They have *never issued any contrary ruling,* although commencing in the year 1937, the Secretary has held in abeyance several hundred such applications. An example of these rulings is one in 1933, by Secretary of the Interior Ickes rejecting an application for a Federal oil and gas lease in the Pacific Ocean off the California coast wherein, after quoting from *Hardin v. Jordan,* 140 U. S. 371, Secretary Ickes stated that:

> *"The foregoing is a statement of the settled law* and therefore no rights can be granted to you either under the leasing act of February 25, 1920 (41 Stat 437), or under any other public-land law *to the bed of the Pacific Ocean either within or without the 3-mile limit. Title to the soil under the ocean within the 3-mile limit is in the State of California, and the land may not be appropriated except by authority of the State.* . . ."[176]

[176]Appendix to Answer, pages 461-463.

4. By the War and Navy Departments.

There have been many occasions when the War Department and Navy Department have asserted and declared the title to submerged lands under the marginal sea to be vested in the respective coastal States. Examples are found (i) in the War Department's report requesting warranty deeds conveying fee title to the United States to 11 acres of submerged lands lying in the marginal sea outside the Entrance of Newport Bay, California; in the War Department's recommendation and request that the California Legislature in 1897 grant strips of submerged lands 300 yards wide around all military and defense reservations, these grants including three and probably four separate areas of hundreds of acres of submerged lands admittedly lying in the "open sea"; (ii) in the Navy Department's report and request for an Act of the California Legislature, passed in 1931, requesting a deed from the State to the United States granting submerged lands in the "open sea" adjoining North Island; (iii) in more than a dozen requests made by the War and Navy Departments resulting in grants, leases, easements and permits from the Cities of Los Angeles and Long Beach covering submerged lands lying in the Pacific Ocean and Bay of San Pedro, extending over a period of three or four decades; (iv) in the War Department's report and request resulting in the 1941 Act of the California Legislature and delivery by the State to the United States of an easement for the use of a 32-acre parcel of submerged lands lying in the marginal sea adjoining Coronado Beach;

(v) in the War Department's reports and requests resulting in grants from other coastal States to the United States of submerged lands admittedly lying in the marginal sea outside of bays and harbors, such as the strip extending approximately two miles into the Gulf of Mexico outside Galveston Harbor, the 1,760-yard strip around Ship Island from the State of Mississippi, the two-mile strip of submerged lands extending into the Atlantic Ocean outside the St. Johns River in Florida, and the strip of submerged lands extending two and one-half miles into the Gulf of Mexico outside the mouth of Crystal River, Florida.

The details of these transactions and the comments of counsel for plaintiff are set forth in Appendix G to this Brief.

(VI)
Conclusion on Acquiescence

This case is brought squarely within the principle of acquiescence by one government in the territory and title of another government, as announced in the long line of decisions of this Court quoted from at the opening of this section on Acquiescence. The facts show a long-continued practice over a number of decades by all the important branches and departments of the United States recognizing and asserting that California and the other coastal States are the owners, respectively, of the submerged lands within the adjoining marginal seas, as well as within bays and harbors. Counsel for plaintiff make lame explanations of some of the specific transactions out of which this long-continued practice irresistibly proves itself. But nothing that counsel have said, we respectfully submit, derogates in the least from the inevitable conclusion of acquiescence.

VIII.

ESTOPPEL—LACHES—RES JUDICATA.

Since the rules of Acquiescence and of Prescription are so clearly applicable to the facts and circumstances of this case, as has, we believe, been firmly established, there is no need to lengthen this Brief with a discussion of the applicability of the rules of Estoppel, Laches or Res Judicata. We therefore do not propose to treat of the separate doctrines of Estoppel, Laches, or Res Judicata in the main part of this Brief, though in no way waiving these defenses asserted in the Answer.

However, since counsel for plaintiff have presented a number of authorities on the doctrine of estoppel and laches and have devoted a number of pages to the subject, we will set forth the controlling aspects of Estoppel, Laches and Res Judicata as between the United States and the State and show the inapplicability of the cases cited by counsel for plaintiff in Appendix H to this Brief. Reference should be made to Appendix H for a discussion of Estoppel, Laches and Res Judicata and the treatment of the authorities on the subject cited by plaintiff.

IX.

INTERNATIONAL LAW.

As previously stated (*supra,* p. 19), we believe plaintiff's entire argument based on the actions of the Federal Government in international affairs is irrelevant to the issues in the case. Nevertheless, because plaintiff has devoted so large a portion of its brief to this subject, we desire to answer its contentions. In order to do this it is necessary to review the development of the marginal sea doctrine in international law, after which we shall show by authority that the Federal Government could have acquired no property rights through the performance of its constitutional duties in the management of our relations with the other nations of the world.

A. By 1776 It Was Established in International Law That a Belt of the Sea Is a Part of the Territory of Every Coastal State.

The international law concept of the marginal sea was an outcome of the seventeenth century struggle for the freedom of the seas. From the fourteenth to the sixteenth century claims were made by various European nations to the complete and exclusive dominance of certain seas.[1] It would serve no purpose to enumerate the grounds upon which it was sought to base these claims. If they came to be viewed at a later period as "vain and extravagant pretensions," they were not regarded *at the time* as being in conflict with prevailing law. Yet the claims were stoutly resisted by many countries in the fifteenth and sixteenth centuries without much success.

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[1]A good account of British claims is to be found in Wade's introduction to Boroughs, *The Sovereignty of the British Seas* (Edinburgh, 1920).

Jurists were driven to find means by which the claims could be confined to definite and restricted areas. They took account, therefore, of the special interests of coastal states in the waters bathing their shores, and they sought to protect such interests without undue interference with the free navigation of the high sea. Every coastal state desired to defend its shores, to hold them free from disturbances due to naval operations conducted by other nations, to enforce its customs and navigation laws, and to exploit the riches of its adjacent sea. The extensive claims advanced by the more powerful nations could not be effectively opposed unless these legitimate desires were satisfied.

In 1589 Albertico Gentili struck a new note in declaring that "the adjacent part of a sea belongs to one dominion and the term 'territory' is used both of land and water.[2] In 1609 Grotius published his *Mare Liberum,* in which he drew a distinction between the inner and the outer sea, and admitted, by implication at least, that the former was not necessarily free.[3] In his more famous work, *De Jure Belli ac Pacis,* first published in 1625, Grotius said that "sovereignty over a part of the sea is acquired . . . in so far as those who sail over the part of the sea along the coast may be constrained from the land no less than if they should be on the land

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[2]Gentili, *De Jure Belli,* Book 3, p. 629 (1612 ed.), as translated by Rolfe in *Classics of International Law,* p. 384. Judge Story's copy of the 1612 edition is now in the Harvard Law Library. Gentili, an Italian, was a professor of law at Oxford.

[3]Grotius' *Mare Liberum* (1609), p. 29. This work was published in 1608 anonymously. The text, with a translation by Magoffin, is reproduced in "The Freedom of the Seas" (Carnegie Endowment, 1916).

itself."[4] He "performed an important service by suggesting that tidal waters—he called this portion of the sea, *proximum mare*—might be limited to so much as could be defended from the shore."[5] However, it is important to note that the advocates of *mare liberum* never contemplated a complete withdrawal of *all* claims to the dominion over the seas. They only sought to *restrict* the extent of the larger claims to practicable limits.

Of course, a seminal idea of this kind does not command immediate acceptance. Time is needed for its germination. In the course of the seventeenth century, however, Grotius' idea that to the dominance of the shore should be added the dominance of the waters bathing the shore within the limit of their effective control, achieved a gradual acceptance. It was accepted not as a vague generality but as a workable concept in the solution of actual controveries. By the close of the seventeenth century the instances of its application had become so numerous that a nascent rule of international law may be discerned. The larger claims to the appropriation of particular seas were not withdrawn; they had not been abandoned, but *they had receded into narrower limits.*[6]

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[4]Book 2, ch. 3, §13, p. 130 (1646 ed.), as translated by Kelsey in *Classics of International Law*, p. 214.

[5]Fenn, *Origin of the Right of Fishery and Territorial Waters* (1926), p. 221.

[6]"So far as Great Britain, at any rate, is concerned, the ownership of the bed of the seas within the three-mile limit is the survival of more extensive claims to the sovereignty of the bed of the sea." Sir Cecil Hurst, sometime President of the Permanent Court of International Justice, in 4 British Yearbook of International Law (1924), p. 43.

Sir Henry Maine, *International Law*, p. 77, regards "the sovereignty of the so-called territorial sea . . . as the direct remnant

This result was due in large measure to the restrictions imposed by the principle that a littoral nation may dominate only so much of the sea as is immediately adjacent to its shores. The general acceptance of this principle marked the triumph of the *mare liberum* over the *mare clausum*, and by the close of the seventeenth century the victory lay with the advocates of the freedom of the seas. "The States which pretended to the sovereignty of the seas ceased to claim the more distant waters in order to hold to the nearer."[7]

1. Acceptance of the Range-of-Cannon Limit.

Discernible in the seventeenth century, also, was a tendency to set a limit on the extent of the marginal sea, a claim to which would be respected by other nations. Various limits were proposed, and at one time it seems to have been possible that the limit of human vision might have prevailed.[8] Yet the Grotian idea of control from the land persisted. In 1703 the Dutch jurist Bynkershoek formulated that idea in a quotable phrase which soon became a legal axiom; by the phrase, ***potestatem terrae finitur, ubi finitur armorum vis,*** he fixed the area which could be controlled from the shore as the ***range of cannon.*** He declared that in his own time "the control of the land

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of a sovereignty which was previously asserted by particular nations over whole seas or large parts of them."

Edwin Borchard, *Resources of the Continental Shelf* (Jan. 1946), 40 Am. J. Int. L., p. 53, 56, states that: "The marginal sea itself, whatever its width, is a compromise between the ancient expansive claims of certain countries to a wide control of portions of the sea and the more modern demands for a free sea."

[7]De LaPradelle, in 5 Revue Générale de Droit International Publique (1898), p. 269, as translated in Crocker, *Extent of the Marginal Sea,* p. 188.

[8]Fulton, *Sovereignty of the Sea* (1911), pp. 544-546.

extends as far as the cannon will carry."[9] In various connections the range of cannon had previously been prescribed, but usually with reference solely to forts situated on the shore. It was "the merit of Bynkershoek's doctrine," according to Fulton, "that it transferred in theory to all parts of a coast this decisive property [test] of compulsion and dominion which, strictly speaking, only existed where forts or batteries were placed."[10]

Again time had to elapse before the general acceptance of the range-of-cannon limit. In 1758 Vattel published his great treatise which for over a hundred years guided much of the juridical thought of America; Vattel said that "today the area of marginal sea which is within the reach of a cannon shot from the coast is regarded as part of the national territory."[11] Writing in 1760, Valin whose work was also widely cited in America, laid down the range of cannon as the proper limit of the territorial sea.[12]

It is therefore clear that by the middle of the eighteenth century the view had come to prevail that as against other states the dominion of a coastal state should not extend beyond the distance of cannon range. In the latter half of the eighteenth century there was general agreement among jurists "that the sea, at least as far as the range

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[9]Cornelius van Bynkershoek, *De Dominio Maris Dissertatio*, Chapter 2, as translated by Magoffin in *Classics of International Law*, p. 44.

The range of cannon had been proposed by Dutch Ambassadors in negotiations with the British as early as 1610. Fulton, *op. cit.*, p. 156.

[10]Fulton, *op. cit.*, p. 558.

[11]Vattel, *Le Droit des Gens* (1758), pp. 250-251, as translated by Fenwick in *Classics of International Law*, p. 109.

[12]Valin, *Nouveau Commentaire sur l'Ordonnance de la Marine* (1760), Vol. 2, p. 638.

of guns from the coast, was accessory to the land," and "no one doubted that this space at all events was included within the territorial sea of the neighboring country.[13]

In the practice and usage of nations, the range of cannon was similarly accepted. A notable example is to be found in the instructions given by the King of England to privateers as early *as 1739, and communicated to the Governor of New Hampshire in America;* it was thereby declared lawful for privateers to set upon and take ships belonging to the King of Spain or his subjects or others inhabiting his countries, territories and dominions "but so as that no hostility be committed nor prize attacked, seized or taken within the harbor of princes or states in amity with us, or in their rivers or roads *within shot of their cannon.*"[14] In 1760, the High Court of Admiralty in England decided that a French vessel captured by a privateer was not good prize because it had been taken within a port of the King of Spain "within reach of his cannon and under his protection."[15]

Similarly, the range of cannon was laid down in seventeenth and eighteenth century treaties, for example, the British treaties with Algiers and Tunis, both in 1762.[16] The earliest treaties made by the United States referred to the marginal sea only in general terms. Our treaty with France in 1778 referred to the defense of vessels in "ports, havens or roads, or on the seas near to coun-

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[13]*Fulton, op. cit.*, p. 566.

[14]2 Batchellor, Laws of New Hampshire, Province Period, 1702-1745, pp. 493-7.

[15]In *The De Fortuyn* (1760), Marsden's Admiralty Cases, p. 175.

[16]1 *Martens, Recueil des Traités,* pp. 68, 72. Raestad lists twelve treaties in the period from 1646 to 1742 which apply the cannon-range principle. Raestad, *La Mer Territoriale* (1913), pp. 108-109.

tries, islands, cities or towns."[17] Our treaty with the Netherlands in 1782 provided explicitly for the protection by each party of the other's vessels "as far as their jurisdiction extends at sea";[18] and our treaty with Prussia in 1785 provided for the protection of vessels within the extent of "jurisdiction by land or sea."[19] Later, however, in the treaty made by the United States with Morocco in 1786 the test was laid down as "within gunshot of the forts."[20]

The Continental Congress, in the discharge of its powers conferred by the Articles of Confederation, recognized the range-of-cannon limit in its Ordinance of December 4, 1781, in which it referred to the lawfulness of captures of enemy property made by various vessels or persons, including those made by inhabitants of this country "if made within a cannon-shot of the shore."[21] An Ordinance of February 2, 1782, related to the capture of American vessels taken "within cannon-shot of the shore of any of these States."[22]

It is, of course, true that the exact width of this belt of marginal sea had not, by 1776, been agreed upon as between nations *in terms of linear measurement*. The fact is, as plaintiff has shown, that the nations of the world have not, even today, agreed upon any fixed distance.

It seems indisputable, however, that by 1776 the basic principle had been established in international law that a

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[17]Article 6, 2 Miller's Treaties, p. 7.
[18]Article 6, *idem*, p. 64.
[19]Article 7, *idem*, p. 167. Similarly, Article 6 of the treaty with Spain of 1795, *idem*, p. 323.
[20]Article 10, *idem*, p. 262. Similarly, Article 8 of the treaty with Tripoli of 1796, and Article 10 of the treaty of Tunis of 1797.
[21]7 Journal of Congress, p. 187.
[22]*Ibid.*, p. 226.

belt or margin of the sea is deemed a part of the territory of every coastal state; and that a second step had been taken in the general acceptance of the range of cannon as the proper limit of the marginal sea.

It seems also indisputable that plaintiff's theory that there was a hiatus in the law between the time of the assumed abandonment of the older and more monopolistic claims and the recognition of the cannon-range limit is fallacious. The truth is, there never was an abandonment of the claims to such part of the adjacent sea as could be dominated from the shore and there never was any hiatus in the law.

The foregoing principles of international law were wholly consistent with the rights of the Crown of England as they existed under the common law and there was nothing in international law which interfered with the possession and exercise of the same rights by the original States when they succeeded to the rights of the Crown in 1776.

2. The Marginal Sea Was Recognized as Territorial in Character by 1776.

Plaintiff advances the argument that in the period between 1776 and 1789 the belt of the sea within cannon range of the coast was not recognized either in international law or in American law as "territorial" in character (Br. pp. 122, 137); and that the littoral states did not exercise soverignty over the marginal sea but only limited powers of police control. (Br. p. 125.) It is submitted that the various citations from international law writers in plaintiff's brief clearly refute such a claim. Indeed, plaintiff admits (Br. p. 117) that Vattel had definitely announced the "territoriality" of the marginal sea to be

the accepted rule *in 1758*. Plaintiff admits (Br. p. 117) that the concept of the territoriality of the marginal sea had reached an "advanced stage of development . . . in the minds of some European publicists shortly prior to the adoption of our Constitution."

The outline, under the preceding head, of the development of the marginal sea doctrine from the time of Grotius demonstrates that the marginal sea, long before 1776, was recognized as an appurtenance to the shore. It has been frequently described as an extension of the land into the sea. *The boundary of a coastal state includes it,* even in the absence of formal declaration to this effect.[23]

In the *Grisbadarna Arbitration* between Norway and Sweden, before a tribunal of the Permanent Court of Arbitration in 1909, the tribunal referred to "the fundamental principles of the law of nations, *both ancient and modern,* in accordance with which, the maritime territory is an *essential appurtenance of land territory,* whence it follows that at the time when, in 1658, the land territory called the Bohuslan was ceded to Sweden, the radius of maritime territory constituting an inseparable appurtenance of this land territory must have automatically formed a part of this cession."[24]

The marginal sea is and always has been inseparable from the coast. Any cession or transfer of coastal territory must include the marginal sea which washes the coast. No example is to be found in history of a transfer of the coast which excluded the marginal sea; nor is any example to be found of the transfer of the marginal sea apart from the coast.

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[23]See *supra,* p. 36, for decisions of our courts supporting this statement.

[24]Scott, Hague Court Reports, pp. 121, 127.

In international treaties and in state constitutions and statutes boundaries have frequently been described as running "to" the sea. Our treaty with Great Britain in 1783 described certain boundaries of the United States as running "to the Atlantic Ocean."[25] Our treaty with Mexico of 1848 described the boundary as running "to the Pacific Ocean."[26] Examples of state constitutions and statutes were given *supra,* page 40. In all such cases, the boundary includes the marginal sea as a matter of course.[27]

An important recognition of the territoriality of the marginal sea is found in a report to the Continental Congress of January 8, 1782, by a committee consisting of Lovell, Carroll and Madison, referring to a proposed treaty relating to fisheries. This report referred to the claim of the Confederated States to the common right to take fish on the banks of Newfoundland, but not within "three leagues of the shores held by Great Britain." The report stated:

> "That under this limitation it is conceived by Congress, a common right of taking fish can not be denied to them without a manifest violation of the freedom of the seas, as established by the law of nations, and the dictates of reason; according to both which the use of the sea, *except such parts thereof as*

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[25]Article 2, 2 Miller's Treaties, p. 153.

[26]Article 5, 5 Miller's Treaties, p. 214.

[27]California Political Code, Section 3907 (enacted 1872), embodies the rule as follows:

> "The words 'in', 'to', or 'from' the ocean shore mean a point three miles from shore."

For other authorities supporting this rule, see p. 36, *supra.*

> *lie in the vicinity of the shore, and are deemed appurtenant thereto,* is common to all nations . . . "[28]

It is vitally important to note that this committee unequivocally declares that a belt of the sea was recognized by the States as appurtenant to the shore both during and prior to the War for Independence.

As early as 1804 Chief Justice Marshall, in his monumental opinion in *Church v. Hubbart,* 2 Cranch. 187, 234 (1804), stated:

> "The authority of a nation, *within its own territory,* is absolute and exclusive. The seizure of a vessel, *within the range of its cannon,* by a foreign force, is an invasion of *that territory,* and is a hostile act which it is its duty to repel."

In 1812, Mr. Justice Story, on the authority of *Church v. Hubbart,* stated in *The Ann,* 1 Fed. Cas. 926, that:

> "As the *Ann* arrived off Newburyport, and within *three miles* of the shore, it is clear that she was within the acknowledged jurisdiction of the United States. All the writers upon public law agree that every nation has exclusive jurisdiction to the distance of a *cannon shot,* or *marine league,* over the waters adjacent to its shores (Bynk. Qu. Pub. Juris. 61; Azuni [Mar. Law], 204, Par. 15; *Id.,* p. 185, par. 4); and this doctrine has been recognized by the supreme court of the United States. [Church v. Hubbart], 2 Cranch [6 U. S.], 187, 231. Indeed such waters are considered as a *part of the territory of the sovereign.*"

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[28]Quoted from Crocker, *The Extent of the Marginal Sea,* p. 630.

In the case of *The Marianna Flora,* 11 Wheat. 1 (1826) it was argued that a ship on the high seas was entitled to occupy so much of the ocean as she might deem necessary for her protection and to prevent any near approach by other ships. In answer to this, Justice Story said (p. 43):

> ". . . This doctrine appears to us novel, and is not supported by any authority. It goes to establish upon the ocean a territorial jurisdiction, like that which is claimed by all nations, *within cannon-shot of their shores,* in virture of their general sovereignty. *But the latter right is founded upon the principle of sovereign and permanent appropriation,* . . ."

It is obvious that when this court expressed the above views as to the fact that the marginal sea was a part of our *territory,* it was not announcing a new rule of law which had been invented subsequent to 1776. It was merely recognizing and applying rules which had been settled for nearly a century. This is demonstrated by Justice Story's citation of Bynkershoek published in 1737. Since it was settled law that the belt of sea to the extent of a cannon-shot was part of the territory of the littoral state by 1776, the question naturally arises: In whom did that territory vest when the original States declared their independence?

The decisions previously cited have determined beyond a doubt that it vested in the individual States as successors to the Crown, and, as we have shown, was never ceded by them either to the Confederation or to the Federal Government.

B. International Law Conferred No Property Rights on the Federal Government.

Under this head we desire to answer the repeated contentions of plaintiff that the Federal Government acquired title to the bed of the marginal sea "exclusively from the position of the national sovereign in international affairs." (Br. p. 89.)

International law simply recognizes that *as between states,* a littoral state may exercise sovereignty over a belt of territorial sea. Of course, sovereignty in this sense means the complete and exclusive jurisdiction of the coastal state *vis-a-vis* other states. It means that no other state can object to the exercise by the coastal state of complete and exclusive jurisdiction. It does not go ahead to provide for the consequences of the exercise of such jurisdiction. Those consequences, as we have said, are determined by the coastal state itself.

It will readily be appreciated, therefore, that international law does not create any proprietary interest in the marginal sea. It does not regulate ownership in a proprietary sense. It is not in any way a source of land titles. It creates no conduit of title. To say with regard to ownership that "the marginal sea is a creature of international law" is to distort the function served by international law, and to misrepresent its substance. For the purposes of relations between nations, one may regard international law as protecting the coastal state's *imperium* and *dominium.* One may even say that it protects the coastal state's "ownership" in the sense of excluding other states. For municipal law purposes, however, international law does not create or dispose of any title; this is left entirely to the coastal state in the exercise of its complete and exclusive jurisdiction. Hence the coastal state may

or may not by its municipal law regulate proprietary ownership. If by its own law it assumes or disposes of property rights in the marginal sea, or in its bed or subsoil, international law merely supplies to the coastal state protection against the invasion of those rights by other states.

Since the bed of the marginal sea is within the territory of the littoral state, the latter is free to assume or to create and dispose of proprietary rights in both the bed and the subsoil. It has therefore been a long-established practice for littoral states to regulate sedentary fishing; the practice extends to the cultivation of oysters on the bed of the marginal sea, and in some parts of the world to the cultivation of pearls. The subsoil has long been used for the extraction of minerals, particularly coal; undersea mining of coal has been extensive in Cornwall, Nova Scotia and Western Australia.

The principles above set forth were clearly stated by this Court in the case of *Skiriotes v. Florida*, 313 U. S. 69 (1941), wherein it was said (pp. 72-73):

> ". . . International law is a part of our law and as such is the law of all States of the Union . . . , but it is a part of our law *for the application of its own principles*, and these are concerned with international rights and duties *and not with domestic rights and duties.*"

It will be seen from the above that ownership of land in a proprietary sense never did emerge and never could have emerged and become vested in any state or country under international law. International law has merely created the conditions under which a littoral state may exercise the powers of ownership conferred upon it by its own law. Whether it does exercise these powers or not, is its own affair.

C. The Actions of the Federal Government in Recognizing the Three-Mile Belt Did Not Constitute an Annexation of Territory.

Plaintiff makes the surprising assertion (Br. p. 77) that the actions of Secretary of State Jefferson and of other Federal officials (Br. pp. 37-43, 128-135) constituted an annexation "to this country" of the three-mile belt.

The simple answer to this claim is that this belt was already within the territory of the original States as successors of the Crown of England.

However, entirely apart from this, it is fundamental under our constitutional system that territory cannot be annexed to and made part of the United States except by Act of Congress, and, as plaintiff itself says (Br. p. 37), Congress has never adopted any statute which makes "the marginal sea or its bed . . . territory of the United States."

The United States may acquire new territory by war, by treaty or by discovery, but, as this Court said in *Fleming v. Page*, 9 How. 602, 615 (1850), such acquisitions "do not enlarge the boundaries of this Union." New territory thus acquired is "not made a part of the United States" in any other way than by Congressional action. *Balzac v. Porto Rico*, 258 U. S. 298, 308 (1922); *Dorr v. United States*, 195 U. S. 138 (1904); *United States v. Arredondo*, 6 Pet. 691, 711 (1832); *Foster v. Neilson*, 2 Pet 253, 309 (1829).

Secretary of State Jefferson and the other Secretaries of State referred to by plaintiff annexed no territory to the United States. They simply declared that the United States, in the performance of its constitutional duties would uphold (as against other nations) the prin-

ciples then generally recognized in international law. It may be said that Thomas Jefferson, in his message of May 15, 1793 (quoted by plaintiff, Br. p. 130) made a significant contribution to international law by his official suggestion of a three-mile limit as being the linear equivalent of cannon range. However, this idea did not actually originate with Jefferson but had been previously suggested by the Venetian, Galiani, in 1782.[29] It was also advocated by an Italian writer, Azuni, in 1795, whose work was frequently cited in America.[30] In 1789 G. F. de Martens fixed the equivalent at three leagues.[31]

Thomas Jefferson was familiar, as perhaps was no other American of his time, with European literature and European thought. Confronted with the necessity of safeguarding our marginal seas from the activities of European belligerents, on May 15, 1793, Jefferson, as Secretary of State, communicated to the French Minister an opinion by Attorney-General Randolph in which the view was expressed that "the necessary or natural law of nations . . . will, perhaps, when combined with the treaty of Paris in 1783, justify us in attaching to our coasts an extent into the sea beyond the reach of cannon shot."[32] On November 8 of the same year, Jefferson expressed to the British and French Ministers more definite views; reserving "the ultimate extent . . . for future deliberation," he informed them that American officers had been instructed to restrain their activities "for

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[29]Galiani, *De Doveri de Principi Neutrali* (1782).

[30]Azuni, *Sistema Universoli dei Principii del Diritto Marittimo* (1795), English translation (New York 1806), I, p. 205. Joseph Story's copy of the latter is now in the Harvard Law Library.

[31]De Martens, *Precis de Droit des Gens* (1789), p. 196.

[32]American State Papers, Class I, Foreign Relations, Vol. 1, p. 147.

the present to the distance of one sea league or three geographical miles from the sea shores.[33] He stated that "the smallest distance, I believe, claimed by any nation whatsoever, is the utmost range of a cannon ball, usually stated at one sea league." He did not purport to create any new rule; *he moved on the basis of pre-existing law.* He referred to the recognition of the three-mile limit in "treaties between some of the powers with whom we are connected in commerce and navigation,"[34] and added that it "is as little, or less, than is claimed by any of them on their own coasts."

The situation produced by international law is grotesquely misconceived in the statement in the plaintiff's brief (p. 81) that the three-mile belt "was the product of a course of action in international affairs sponsored by the national government," from which can be deduced proprietary "rights in the three-mile belt" as "finally" emerging.

What the Federal Government did in its conduct of international affairs is accurately to be described as follows: It proceeded on the basis of the international law as it existed in 1789, when the marginal sea of our coastal states had already become established within the range of cannon; it successfully advocated a linear measurement of the range of cannon at three miles; it stoutly resisted any encroachment by other nations on the marginal sea of our States; and it used its influence, on be-

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[33]The letter to the French Minister is in *idem*, p. 183; that to the British Minister is in 1 Moore's Digest, p. 702.

[34]Jefferson must have referred to such treaties as the British-Algiers treaty of 1762, the British-Tunis treaty of 1762, the British-French treaty of 1786, and the French-Russian treaty of 1787. He doubtless also had in mind the American-Morocco treaty of 1786.

half of our States and our nationals, to restrict other nations in their assertions of complete and exclusive jurisdiction over *their* marginal seas to no greater extent than the accepted minimum of three miles. In all of this "course of action in international affairs," the Federal Government never had any thought of regulating the proprietary ownership of our marginal sea, or of its bed or subsoil. Its activity never even veered in that direction. Had it done so, the Federal Government would have exceeded its delegated powers under the Constitution.

With the Federal Government in control of our international relations, of course it undertook responsibility as against other nations for maintaining the integrity of the States' marginal seas, and it pressed for the freedom of the high seas against encroachment by the extension of the marginal seas of other nations. The States were not in a position to protect their own interest as against other nations. Yet as against the States, the Federal Government *cannot gain advantages for itself by discharging its constitutional functions.* And to say that by its conduct of international affairs it can deprive our States of their ownership of the marginal seas and can, in consequence, *gain for itself land titles* in the bed and subsoil of the States' marginal seas, is to attack the very foundations of our whole federal system. The Constitution itself is the answer to the Federal Government in this case.

Conclusion.

We respectfully submit that plaintiff's complaint should be dismissed for the following reasons:

1. The complaint presents no case or controversy under Article III, Section 2 of the Constitution, and hence the

Court is without jurisdiction to render a decree as prayed for therein.

2. The Attorney General is not authorized to bring or maintain the present proceeding.

3. On the merits of the abstract question of ownership of the bed of the marginal sea, plaintiff has shown no legal or factual basis upon which the claims of the Federal Government can be upheld. On the contrary, all the authorities which deal with this question and all the facts before the Court establish and demonstrate that California has perfect and unassailable title to the beds of all navigable waters within its constitutionally established boundaries.

Respectfully submitted,

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